TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 260.

HUGH WALLACE, WILL WALLACE, VERGE GOODWIN, ET AL., PLAINTIFFS IN ERROR,

vs.

MRS. ELLA ADAMS, FOR HERSELF AND AS NATURAL GUARDIAN AND NEXT FRIEND OF HENRY McSWAIN AND ROMA McSWAIN, HER MINOR CHILDREN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED APRIL 20, 1906.

(20,205.)

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a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1905, of said Court, begun and held at the United States Court House in the City of St. Louis, Missouri, on the first Monday in December, to-wit: the fourth day of December, A. D. 1905, before the Honorable Walter H. Sanborn, the Honorable William C. Hook and the Honorable Elmer B. Adams, Circuit Judges:

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the thirty-first day of August, A. D. 1905, a transcript of record, pursuant to a writ of error directed to the United States Court of Appeals in the Indian Territory, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Hugh Wallace, *et al.*, were Plaintiffs in Error and Mrs. Ella Adams, for herself and as natural guardian and next friend of Henry McSwain and Roma McSwain, her minor children, were Defendants in Error, which said transcript of record is in the words and figures following, to-wit:

b UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Court of Appeals in the Indian Territory, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Court of Appeals before you, at the June Term, 1905, thereof, between Hugh Wallace, Will Wallace, Virge Goodwin, Chas. Shannon, John Hunt, John Perkins and B. C. Hill, Appellants, against Mrs. Ella Adams for herself and as natural guardian and next friend of Henry McSwain and Roma McSwain, her minor children, Appellees, a manifest error hath happened, to the great damage of the said Hugh Wallace, Will Wallace, Verge McGoodwin, Chas. Shannon, John Hunt, John Perkins and B. C. Hill, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the

office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the seventh day of October, 1905, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this seventh day of August, in the year of our Lord one thousand nine hundred and five (1905).

Issued at office in the City of South McAlester, Indian Territory, with the seal of the United States Court of appeals in the Indian Territory, *with the seal of the United States Court of Appeals in the Indian Territory*, hereto affixed the date last above written.

[Seal United States Court of Appeals, Indian Territory.]

WM. P. FREEMAN,
Clerk United States Court of Appeals
in the Indian Territory.

Allowed by
WM. H. H. CLAYTON,
Associate Justice United States Court of Appeals
in the Indian Territory.

Return to Writ.

UNITED STATES OF AMERICA, *Indian Territory, ss:*

In the Court of Appeals.

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a duty certified transcript of the record and proceeding in the within entitled case, with all the things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Court at office in the City of South McAlester, this 10th day of August, A. D. 1905.

[Seal United States Court of Appeals, Indian Territory.]

WM. P. FREEMAN,
Clerk of the United States Court of Appeals
in the Indian Territory.

United States Circuit Court of Appeals, Eighth Circuit. Hugh Wallace *et al.*, Plaintiffs in Error, *vs.* Mrs. Ella Adams *et al.*, Defendants in Error. Writ of Error to the United States Court of Appeals in the Indian Territory.

d The United States of America to Mrs. Ella Adams, for herself and as natural guardian and next friend of Henry McSwain and Roma McSwain, her minor choldren, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a Writ of Error, filed in the Clerk's office of the United States Court of Appeals in the Indian Territory, wherein Hugh Wallace, Will Wallace, Verge McGoodwin, Chas. Shannon, John Hunt, John Perkins and B. C. Hill, are Plaintiffs in Error, and you are Defendants in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiffs in Error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Honorable William H. H. Clayton, Associate Justice of the United States Circuit Court of Appeals in the Indian Territory, this 9th day of August, in the year of our Lord one thousand nine hundred and five (1905).

WM. H. H. CLAYTON,
Associate Justice of the United States Court of Appeals in the Indian Territory.

I, H. H. Brown, Attorney of Record for the defendants in error, Mrs. Ella Adams, *et al.*, hereby accept full and complete service and notice of the foregoing citation in error. This the 11th day of August, 1905.

H. H. BROWN,
Attorney for Defendants in Error.

United States Circuit Court of Appeals, Eighth Circuit. Hugh Wallace *et al.*, Plaintiffs in Error, *vs.* Mrs. Ella Adams *et al.*, Defendants in Error. Citation on Writ of Error.

UNITED STATES OF AMERICA, *Indian Territory, In the Court of Appeals, set:*

Pleas and Proceedings in the United States Court of Appeals in the Indian Territory, at a term begun and held at the Court House in the City of South McAlester, Indian Territory, on the 13th day of June, A. D. 1905.

Present and presiding:
Hon. Charles W. Raymond, Chief Justice;
Hon. Wm. H. Clayton, Associate Justice;
Hon. Hosea Townsend, Associate Justice;
Hon. Joseph A. Gill, Associate Justice;
George K. Pritchard, U. S. Marshal, and
Wm. P. Freeman, Clerk.

HUGH WALLACE, WILL WALLACE, VERGE MCGOODWIN, CHAS. SHANNON, JOHN HUNT, JOHN PERKINS, and B. C. HILL, Appellants,

vs.

MRS. ELLA ADAMS, for Herself and as Natural Guardian and Next Friend of HENRY MCSWAIN and ROMA MCSWAIN, Her Minor Children, Appellees.

Be It Remembered, That heretofore, to-wit, on the 28th day of April, A. D. 1905, there was filed in the office of the Clerk of the United States Court of Appeals in the Indian Territory, at South McAlester, a transcript of the record and proceedings of the United States Court for the Southern District of the Indian Territory, sitting at Ardmore, in the above entitled cause, which is in the words and figures following, to-wit:

1 In the United States Court for the Southern District of the Indian Territory, at Ardmore.

MRS. ELLA ADAMS, for Herself and as Natural Guardian and Next Friend of HENRY MCSWAIN and ROMA MCSWAIN, Her Minor Children, Plaintiffs,

vs.

HUGH WALLACE, WILL WALLACE, VERGE MCGOODWIN, CHAS. SHANNON, JOHN HUNT, JOHN PERKINS, and B. C. HILL, Defendants.

Complaint at Law.

The plaintiffs respectfully state that they are all residents of the Southern Judicial District of the Indian Territory, and members of the Chickasaw Tribe of Indians, and the defendants all reside within the jurisdiction of the United States Court at Ardmore: and the defendants are United States Citizens and not members of any tribe or nation. For cause of action, the plaintiffs allege:

That on the 12th day of September, 1904, the plaintiffs appeared at the Chickasaw Land Office, and filed upon the following and

hereinafter described land. The plaintiffs are the owners of and entitled to the immediate possession of said land; together with the improvements thereon, and no other Indian citizen has any right, claim or interest in or to said land or the improvements or crops now situated upon the same. The land herein above referred to being described as follows: The same being the land filed by Henry McSwain.

The south half of the southeast quarter, and the southeast quarter of the northeast quarter of the southeast quarter; and the southeast quarter of the northwest quarter and the north half of the southwest quarter of section twenty-eight, township two south, range two west.

Plaintiffs further state that on the 21st day of September, 1904, they appeared at the Chickasaw Land Office, and the plaintiff,
2 Mrs. Adams, selected for Roma McSwain, her minor child, the following and hereinafter described premises, all of which belongs to the plaintiff, Roma McSwain, and no other citizen or Indians have any rights, title or interest in or to said premises, and no other person has any right to collect the rents due for the use of said premises for this year (1904); which land is claimed by Roma McSwain and is described as follows:

The northwest quarter of the southeast quarter; and the southwest quarter of the southwest quarter of section twenty-eight, township number two south, range one west; and the west half of the northwest quarter of the northeast quarter and the northeast quarter of the northwest quarter; and the northeast quarter of the northwest quarter of the northwest quarter of section thirty-three township two, south, range one west.

All of which land is situated within two miles of the town of Woodford, Indian Territory. The plaintiffs state that they are entitled to the immediate possession of all of said land, and they are the owners of the same; and the defendants now occupying, managing and controlling said premises, are doing so without the consent or permission of the plaintiffs, and the plaintiffs are entitled to the rents for the use of the premises aforesaid, for the year 1904.

That about 270 acres of said land is in a state of cultivation, and the average and reasonable rental value for said premises is one-third of all grain, and one-fourth of all cotton to be produced on said premises for said year (1904). That said grain and cotton will average the sum of $3.00 per acre per annum.

That the defendants are insolvent and in the event the plaintiffs should obtain a judgment in this court for possession of said premises and for the rents due for the use of the same for this year, and the crops are now being gathered, and disposed of, and will all be gathered and marketed before this case can be tried, and unless the court appoints a receiver to collect said rents and take charge of said premises, the plaintiffs' rights will be lost:

Wherefore, the plaintiffs pray that each and all of said defendants be summoned to appear and answer this complaint and on final trial they have judgment for possession of said premises; together with the reasonable rental value of the same for the year 1904, and for such other time as the defendants may wrongfully occupy the

same, but the reasonable value as — rent is to be ascertained by a judgment of this court, and pending said suit, they pray that
3 a receiver may be appointed to take charge of said premises, and collect the rents for the year 1904, and hold said rents for the further order of the court, and if said suit is not determined by the 1st of the year 1905, that said receiver be empowered to rent the premises for the year 1906, and hold the same subject to the further order of the court. And on final hearing plaintiffs pray judgment for possession of said land.

H. H. BROWN,
Attorney for Plaintiffs.

Now comes Mrs. Ella Adams, one of the plaintiffs in the above and foregoing action, and upon oath states that she is one of the plaintiffs in said action; and she is acquainted with the facts therein and the same are true and correct.

——— ———.

Subscribed and sworn to before me this the — day of September, 1904.

——— ———,
Notary Public.

In the United States Court for the Southern District of the Indian Territory at Ardmore.

MRS. ELLA ADAMS, for Herself and as Natural Guardian and Next Friend of HENRY MCSWAIN and ROMA MCSWAIN, Her Minor Children, Plaintiffs,

vs.

HUGH WALLACE, WILL WALLACE, VERGE MCGOODWIN, CHAS. SHANNON, JOHN HUNT, JOHN PERKINS, and B. C. HILL, Defendants

Second Amended Answer.

Comes now the defendant, B. C. Hill, leave of the court being first had, and amends his original and amended answer herein, so as to make the same read as follows:

This defendant denies that he is not a member of any Indian Tribe, but states that he is a member of the Choctaw Tribe of Indians by blood. He denies that the plaintiffs are the owners of, or entitled to the immediate possession, of the land described in plaintiff's complaint, or any of the improvements situated thereon. He denies that the plaintiffs, or either of them are entitled to the immediate possession of all, or any portion, of said land; or that they are entitled to the rents for the year 1904, or any other time. This defendant denies that there is as much as two hundred and seventy acres of said land in cultivation, or that the rental value of said land is of the reasonable price of three dollars per acre.

4 2d. This defendant states that he is a member of the Choctaw Tribe of Indian- by blood, and as such entitled to all the

rights, privileges and immunities of other members of said Tribe. He states that on the 8th day of July, 1896, the Commission to the Five Civilized Tribes of Indians, acting under the authority conferred upon such Commission by the Act of Congress, June 10, 1896, adopted and promulgated the following rule to govern said Commission in hearing and determining the applications for citizenship in any one of the Five Civilized Tribes, as provided for by the said Act of Congress:

"Any person desiring that said Commission pass upon his claim for citizenship, in any of said tribes, under the provisions of this act, must make application in writing, signed and sworn to, containing a particular statement of the grounds upon which his claim is based, and accompanied by such evidence, in the form of affidavits, depositions, or record evidence, as he may desire to have considered in support of his claim,—all to be forwarded, under seal to the Commission at Vinita, I. T., before the 10th day of September, 1896.

The application should state facts sufficient if true, to show that the applicant is entitled to citizenship. The applicant must, at the same time, furnish the chief or governor of the nation in which citizenship is sought, a copy of such application, and evidence, and shall furnish to the Commission evidence of this fact. Such chief, or governor must, within thirty days thereafter, furnish the Commission his answer thereto, signed and sworn to be some duly authorized officer of his government, and accompanied by such evidence in the form of affidavits, depositions or record evidence as he may desire the Commission to consider in support of his answer.

All argument shall be in writing.

HENRY L. DAWES, *Chairman;*
FRANK C. ARMSTRONG,
A. S. McKENNON,
T. B. CABANISS,
A. B. MONTGOMERY,
Commissioners.

3d. Defendant states that his right to membership in said Tribe of Indians, having been questioned by the Choctaw authorities he on the 10th day of August, 1896, presented to the said Commission to the Five Civilized Tribes, his application to be enrolled as a member of the said Choctaw Tribe of Indians. He states that said application was signed and sworn to. That a copy of same, together with a copy of all evidence used in the trial of said application, was, within thirty days after the filing of said application, furnished to the governor of the said Choctaw Nation, and that this defendant, in all things, complied literally with the requirements of the rules established by the said Commission governing the application of parties to membership in any one of the said Five Civilized Tribes.

Defendant states that thereafter, on the — day of November, 1896, his said application was acted upon by said Commission, and that membership in said Tribe was denied him, and thereafter on

the -- day of November, 1896, this defendant appealed from the finding of said Commission to this court, to-wit: The United States Court for the Southern District of the Indian Territory sitting at Ardmore.

Defendant states that on the 8th day of March 1898 said cause came on to be heard before the said court, and after the introduction of testimony and the argument of counsel, the said court having jurisdiction of said cause, rendered he following decree:

No. 149.

"J. M. HILL ET AL.
vs.
THE CHOCTAW NATION.

This day this cause coming on to be heard, upon the pleadings, exhibits, proofs and master's report filed herein, and it appearing that said report has been filed since the 21st day of February, 1898, and no exceptions filed thereto, it is therefore,

Ordered, Adjudged and Decreed by the court that said report be, and the same is hereby, confirmed in all respects. It is further adjudged that the applicants, J. M. Hill, Willie Hill, Sewell Hill, Fannie Simpson, John Simpson, Grady Simpson, Ada Bickham, Cullie Bickham, Laura Miles, Mabel Miles, Myrtle Hill, Philip Hill, Swaney Hill, Connie Hill, Jewell Hill, Grover Hill, B. C. Hill, Albert Hill, Leona Hill, Ray Hill, Bertha Hill and Mada Hill each and all be admitted as members of the Choctaw Tribe of Indians by blood, and that the applicants, Amanda Hill, wife of J. M. Hill, and Adelia Hill, wife of B. C. Hill, each and both be admitted as members of the Choctaw Tribe of Indians by intermarriage.

It is further adjudged that each and all the above named
6 parties are entitled, and are hereby given all the rights, privileges and immunities of members of the Choctaw Tribe of Indians, and the Clerk of this court is hereby ordered to transmit a certified copy of this judgment to the proper authorities, who are instructed to enroll them as such."

This defendant states that by virtue of said decree, he was admitted and decreed to be a member of the Choctaw Tribe of Indians by blood, as such entitled to all the privileges, rights and immunities of other members of said Tribe; that said judgment or decree has never been reversed, modified or set aside; but is now in full force and effect, and by reason thereof, it immediately became the duty of the said Commission to the Five Civilized Tribes to enroll this defendant as a member of the said Choctaw Tribe of Indians.

Defendant states that the said Choctaw Tribe of Indians, under the Act of July 1, 1898, appealed said cause to the Supreme Court of the United States, and on the — day of May, 1899, said cause came on for hearing before the said Supreme Court, and was in all things, affirmed and said Supreme Court issued to the said United States Court for the Southern District of the Indian Territory its mandate, directing the said court that such further execution and process should be had as according to right and justice, should be, the said appeal notwithstanding.

4th. Defendant states that on the — day of March, 1898, acting upon the faith of said judgment, he reduced to his possession, the property described in plaintiff's complaint, and has ever since held possession of the same, claiming the same as owner thereof, by virtue of his membership in said Tribe. He states that ever since he reduced said property to his possession, it has been his purpose, and is now his purpose, to take the same as his allotted share of the tribal lands of the Choctaw and Chickasaw Tribes of Indians. He states that after he reduced said property to his possession, he placed thereon fencing, houses and other lasting and permanent improvements of the reasonable value of One Thousand Dollars; and that on the 28th day of June, 1898, he was in possession of said land and improvements, claiming the same as his own.

5th. Defendant states that on the 1st day of September, 1898, and at divers times thereafter, he has placed upon said land, other lasting and valuable improvements of the reasonable value of One Thousand Dollars, all of which improvements are now upon said property, and all of which land and improvements are, as this defendant claims, his individual property.

7 6th. This defendant states that on the — day of —— 1902, the so-called "Choctaw and Chickasaw Citizenship Court," in a case pending before said court, styled "The Choctaw and Chicksaw Nation or Tribe of Indians *vs.* J. T. Riddle *et al.*" rendered a pretended decree, purporting to set aside and annul certain judgments of the United States Court for the Southern District of the Indian Territory, and of the United States Court for the Central District of the Indian Territory. Said pretended decree is in the following language, to-wit:

"The Choctaw and Chicksaw Nations or Tribes of Indians,
Plaintiffs,
vs.
J. T. Riddle, D. S. Riddle, L. A. Riddle, Elizabeth Casey, Joshua Casey, Andrew B. Hill, L. T. Hill, James W. Balthrop, T. D. Arnold, J. H. Bratcher, for Themselves and as Representatives of all Persons Similarly Situated, Claiming to be Members of the Choctaw and Chickasaw Nations, by Virtue of Alleged Decrees of the United States Court for the Central and Southern Districts of the Indian Territory Sitting Respectively at South McAlester and Ardmore, and Commonly Known as Court Claimants Defendants.

This cause coming on further to be considered, and it appearing to the court, that the paper writing purporting to be the judgment of this court herein, heretofore filed with the clerk, does not conform to the written opinion announced and rendered by the court, which has been filed and entered as a part of the record herein it is therefore ordered, adjudged and decreed by the court, that said paper writing purporting to be the judgment of this court herein, of date the 17th day of December, 1902, be and the same is hereby amended, and the following is the true judgment, intended to be entered by this court herein of that date, and the same is hereby

entered of record as the judgment of this court in this case, in accordance with the said opinion and that the same be so filed, *nunc pro tunc* as of date, the 17 day of December, 1902, as follows, to-wit:

This day this cause came on to be heard, and having been
8 fully argued by counsel, was submitted to this court on the pleadings, exhibits and testimony, upon consideration whereof, the court finds:

That due and legal notice of the pendency and prayer of this suit has been given to the defendants herein, in conformity of law;

That said defendants appeared at the hearing hereof, in person and by counsel, and that each and all of said defendants, who desired to be heard, were heard;

That notice to each of said Choctaw and Chickasaw Nations or tribes of Indians of the proceedings in the United States Court in the Indian Territory, acting under the Act of Congress, approved June 10, 1896, admitting persons to citizenship, or to enrollment as such citizens, in the Choctaw and Chickasaw Nations respectively, was indispensable;

And the court further finds that in said proceedings, in the United States Court in the Indian Territory, and said courts proceeded to hear and determine said causes *de novo,* and did not confine the same to a review of the proceedings had before the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission;

That by reason of each of said facts, to wit: That the proceedings in said United States Courts, were had without notice to each of said tribes or nations when notice of each of said nations was indispensable, and that said United States Courts tried said causes *de novo* when their action should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission, all of said proceedings, decrees and decisions, of said United States Courts in the Indian Territory, admitting any and all persons to citizenship or enrollment, as such citizens in said nations or tribes of Indians or either of them, ought to be set aside, annul-ed and vacated.

It is therefore, Ordered, Adjudged and Decreed, that all of said judgments, decrees and decisions, rendered by the United States Courts in the Indian Territory, acting under the Act of Congress, approved June 10, 1896, admitting persons to citizenship or to enrollment as such citizens, in the Choctaw and Chickasaw Nations respectively, upon appeal from the Commission to the Five Civilized Tribes, in favor of the ten defendants, named in the bill in this proceeding, as well as to those who have come in and made themselves parties thereto, and the judgments rendered as aforesaid, in favor of all persons similarly situated, are set aside, annulled,
9 vacated and held for naught.

(Signed) SPENCER B. ADAMS,
Chief Judge.
WALTER L. WEAVER,
Associate Judge.
HENRY S. FOOTE,
Associate Judge."

Defendant states that he was not a party to said proceedings; that no notice was ever served on him in the execution of said "pretended suit"; that no testimony was introduced in the trial of said cause to show that this defendant was situated similar-y to either one of the defendants in said suit; and that said "pretended decree" did not in any manner, set aside or affect the judgments of this court, declaring this defendant to be a member of the Choctaw Tribe of Indians. Defendant states that the so-called "C-octaw and Chickasaw Citizenship Court" had no jurisdiction of the person of this defendant; that it was without authority to pass upon or determine his right; that the so-called court was not a judicial tribunal, but was a political agency, or Commission, and as such had not power to set aside, modify or, in any manner, affect the decree of the said United States Court for the Southern District of the Indian Territory establishing the rights of this defendant, as a member of the said Choctaw Tribe of Indians.

7th. The defendant states that on the — day of —— 1898, he exhibited a duly certified copy of the decree of the United States Court for the Southern District of the Indian Territory, admitting him to citizenship, to the said Commission to the Five Civilized Tribes, and asked to be enrolled as a member of the said Choctaw Tribe of Indians. That on the — day —— 1904, the said Commission to the Five Civilized Tribes, refused, and has ever since, refused, and still refuses, to enroll this defendant as a member of said tribe of Indians, claiming that the "pretended decree" of the so-called "Choctaw and Chickasaw Citizenship Court" vacated and annulled the decree of the United States Court for the Southern District of the Indian Territory, declaring this defendant to be a member of the Choctaw Tribe of Indians.

8th. This defendant states that on the 15 day of September, 1904, he appeared before the said Commission to the Five Civilized Tribes, and demanded the right to select the land sued for in this suit, as his allotment, and demanded that the same be allotted to him as a member of the Choctaw Tribe of Indians. This request was, by the said Commission, without authority of law, refused. This defendant, then asked permission of the said Commission to file a contest, contesting the right of the plaintiffs to allot such land, and requesting that he be permitted to show that he was the owner of said property and entitled to allot the same, and that the plaintiffs have no right or title in or to the same. This request was by the said Commission, without authority of law, and without investigation, refused.

The defendant states that the Commission refused to investigate the question as to whether or not this defendant is a member of the Choctaw Tribe of Indians, and refuses to hear any testimony to determine whether or not the defendant is the owner of the property sued for. Said Commission would enroll this defendant as a member of the said Tribe of Indians, and would allot said land to this defendant, except for the fact that the said Commission, and the members thereof, hold that the so-called "Judgments" of the "Choctaw and Chickasaw Citizenship Court" vacated the judgment of

this court admitting this defendant to citizenship, and said Commission now claims to be without jurisdiction to pass upon or determine the right of this defendant. This defendant states that ever since the 28th day of June, 1898, he has been, and now is, the owner of the land sued for; together with all the improvements thereon: that the plaintiffs are trying to deprive him of the use and benefit of said property, as well as the ownership thereof, without process of law.

This defendant states that said land has been appraised by the said Commission to the Five Civilized Tribes; that the same does not amount to more in value than three hundred and twenty acres of the average land of the said Choctaw and Chickasaw Tribes of Indians, and is not more in value than or in acres than this defendant is entitled to allot in his own proper person, as a member of the said Choctaw Tribe of Indians.

This defendant states that at the time said land was filed upon by the plaintiffs they knew all the foregoing facts—that he had been adjudged by the United States Court for the Southern District of the Indian Territory to be a member of the Choctaw Tribe of Indians; that they knew the defendant had been in the possession of said property since the 15th day of March, 1898: that they knew the defendant had erected improvements upon said property, as before mentioned; and they are seeking to deprive this defend-
11 ant of his ownership to said property, without compensation and without due process of law. Defendant states that said property is reasonably worth the sum of Fifty Two Hundred Dollars

Defendant states that prior to the 28th day of June, 1898, all the lands in the Chickasaw and Choctaw Nations were, by the said Commission to the Five Civilized Tribes, surveyed into sections and legal subdivisions thereof, preparatory to allotment.

Wherefore, this defendant asks that this cause be transferred to the Equity docket; that the filing of the plaintiffs upon said land may be canceled; that he be declared to be the owner of said land; and that he be quieted in his title to possession of the same; for his costs and all other proper relief.

CRUCE, CRUCE & BLEAKMORE,
Attorneys for Defendant B. C. Hill.

Endorsed on back: No. 5982. Mrs. Ella Adams, *et al., vs.* Hugh Wallace, *et al.* Second Amended Answer. Filed in open Court April 8, 1905. C. M. Campbell, Clerk.

In the United States Court for the Southern District of the Indian Territory at Ardmore.

MRS. ELLA ADAMS, for Herself and as Natural Guardian and Next Friend of HENRY MCSWAIN and ROMA MCSWAIN, Her Minor Children, Plaintiffs,

vs.

HUGH WALLACE, WILL WALLACE, VERGE MCGOODWIN, CHAS. SHANNON, JOHN HUNT, JOHN PERKINS, and B. C. HILL, Defendants.

Second Amended Answer.

Come now the defendants, Hugh Wallace, Will Wallace, Verge McGoodwin, Chas. Shannon, John Hunt, and John Perkins, and for amendment to their first amended answer herein, they adopt as their separate answer, the second amended answer of the defendant, B. C. Hill, filed herein, and they state that for reasons therein set forth, said plaintiff is not entitled to recover the property sued for, and they therefore ask to be discharged for their costs.

CRUCE, CRUCE & BLEAKMORE.

12 Endorsed on back: Mrs. Ella Adams, *et al., vs.* Hugh Wallace, *et al.* Second Amended Answer Filed in open Court April 8, 1905. C. M. Campbell, Clerk.

In the United States Court for the Southern District of the Indian Territory at Ardmore.

MRS. ELLA ADAMS, for Herself and as Natural Guardian and Next Friend of HENRY MCSWAIN and ROMA MCSWAIN, Her Minor Children, Plaintiffs,

vs.

HUGH WALLACE, WILL WALLACE, VERGE MCGOODWIN, CHAS. SHANNON, JOHN HUNT, JOHN PERKINS, and B. C. HILL, Defendants.

Comes now the plaintiff, and demurs to the second amended answer of the defendants, Hugh Wallace, Will Wallace, Verge McGoodwin, Chas. Shannon, John Hunt, and states that the same does not set up facts sufficient to constitutte a defense to plaintiff's complaint.

H. H. BROWN,
Attorney for Plaintiff.

Endorsed on back: Mrs. Ella Adams, *et al., vs.* Hugh Wallace, *et al.* Demurrer. Filed in open Court April 8, 1905. C. M. Campbell, Clerk.

In the United States Circuit Court for the Southern District of the Indian Territory at Ardmore.

MRS. ELLA ADAMS ET AL.
vs.
HUGH WALLACE ET AL.

Demurrer.

Comes now the plaintiff, and demurs to the second amended answer of the defendant, B. C. Hill; and says that the same does not contain any defense to the plaintiff's cause of action.

H. H. BROWN,
Attorney for Plaintiff.

13 Endorsed on back: Mrs. Ella Adams, *et al.*, *vs.* Hugh Wallace, *et al.* Demurrer. Filed in open Court April 8, 1905. C. M. Campbell, Clerk.

In the United States Court for the Southern District of the Indian Territory at Ardmore.

MRS. ELLA ADAMS, for Herself and as Natural Guardian and Next Friend of HENRY MCSWAIN and ROMA MCSWAIN, Her Minor Children, Plaintiffs,

vs.

HUGH WALLACE, WILL WALLACE, VERGE MCGOODWIN, CHAS. SHANNON, JOHN HUNT, JOHN PERKINS, and B. C. HILL, Defendants.

Judgment.

This day came on to be heard plaintiff's demurrer to the second amended answer of the defendants, Hugh Wallace, Will Wallace, Verge McGoodwin, Chas. Shannon, John Hunt, and John Perkins, and the Court, being sufficiently advised, said demurrer is hereby sustained; and came on for further hearing the plaintiff's demurrer to the second amended answer of the defendant, B. C. Hill, and the court, being fully advised, the same is sustained, and the said defendants, declining to plead further, it is therefore ordered, adjudged and decreed by the Court that the plaintiff, Mrs. Ella Adams, for herself, and as natural guardian and next friend of Henry McSwain and Roma McSwain, do have and recover of, and from, *the* Hugh Wallace, Will Wallace, Verge Goodwin, Chas. Shannon, John Hunt, and John Perkins, defendants, B. C. Hill, the premises described in plaintiff's complaint. That is to say, the south half of the southeast quarter, and the southeast quarter of the northeast quarter; of the southeast quarter; and the southeast quarter of the southwest quarter; and the north half of the southwest quarter; and the northwest quarter of the southeast quarter; and

the southwest quarter of the southwest quarter of section 28, township 2 south, range one west; also the west half of the northwest quarter of the northeast quarter; and the northeast quarter of the northwest quarter; and the northeast quarter of the northwest quarter of section 33, township 2 range one west, all in the Chickasaw Nation, Indian Territory; together with all costs of
14 plaintiffs herein expended, for which let execution issue.

It is further ordered that the money in the hands of the receiver in this case be paid to plaintiff. To which action of the court, in sustaining said demurrer, and in rendering judgment for the plaintiff, the defendants, in open court, except.

In the United States Court for the Southern District of the Indian Territory at Ardmore.

MRS. ELLA ADAMS, for Herself and as Natural Guardian and Next Friend of HENRY MCSWAIN and ROMA MCSWAIN, Her Minor Children, Plaintiffs,

vs.

HUGH WALLACE, WILL WALLACE, VERGE MCGOODWIN, CHAS. SHANNON, JOHN HUNT, JOHN PERKINS, and B. C. HILL, Defendants.

Motion for New Trial.

Come now the defendants herein, and move the court to set aside the judgment herein rendered, and grant them a new trial, for the following reasons:

The court erred in sustaining the demurrer to the second amended answer of Hugh Wallace, Will Wallace, Verge McGoodwin, Chas. Shannon, John Hunt and John Perkins.

2d. The court erred in sustaining the demur-er to the second amended answer of the defendant, B. C. Hill.

3d. The Court erred in rendering judgment against the defendants herein.

CRUCE, CRUCE & BLEAKMORE,
Attorneys for Defendant.

Endorsed on back: Mrs. Ella Adams, *et al., vs.* Hugh Wallace, *et al.* Motion for new trial. Filed in open Court April 8, 1905. C. M Campbell, Clerk.

In the United States Court for the Southern District of the Indian Territory at Ardmore.

MRS. ELLA ADAMS ET AL.
vs.
HUGH WALLACE ET AL.

Bill of Exceptions.

Be it remembered, that at a regular term of the United
15 States Court for the Southern District of the Indian Territory, at Ardmore, on this the 8th day of April 1905, came on to be heard the demurrer to the second amended answer of the defendant, B. C. Hill, which demurrer was, by the court sustained; to which the defendants excepted. And on the same day, and at the same time, came on to be heard the demurrer to the second amended answer of Hugh Wallace, Will Wallace, Verge McGoodwin, Chas. Shannon, John Hunt, and John Perkins; which demurrer was, by the court sustained; to which action of the court, the defendants excepted.

And on the same day, the Court rendered judgment for the plaintiffs, to which the defendants excepted. And on the same day, came on to be heard defendant's motion for a new trial, which motion was overruled; to which the defendant excepted. Said motion is in the following words, to wit:

"In the United States Court for the Southern District of the Indian Territory at Ardmore.

MRS. ELLA ADAMS ET AL.
vs.
HUGH WALLACE ET AL.

Motion for a New Trial.

Come now the defendants herein, and move the court to set aside the judgment herein rendered, and grant them a new trial for the following reasons:

The court erred in sustaining the demurrer to the second amended answer of Hugh Wallace, Will Wallace, Verge McGoodwin, Chas. Shannon, John Hunt and John Perkins.

2d. The court erred in sustaining the demurrer to the second amended answer of the defendent, B. C. Hill.

3d. The court erred in rendering judgment against the defendants herein.

CRUCE, CRUCE & BLEAKMORE,
Attorneys for Defendants.

On the same day, the defendants prayed an appeal to the United States Court of Appeals for the Indian Territory, which was granted,

and they were given sixty days' time in which to file a bill of exceptions.

And now, on this the 17th day of April, 1905, the foregoing is declared to be a correct bill of exceptions in this case, and is ordered to be filed by the Clerk, as a part of the record.

HOSEA TOWNSEND, *Judge.*

16 Endorsed on back: No. 5982. Mrs. Ella Adams *et al. vs.* Hugh Wallace *et al.* Bill of Exceptions. Filed April 17, 1905. C. M. Campbell, Clerk.

In the United States Court for the Southern District of Indian Territory at Ardmore.

MRS. ELLA ADAMS, for Herself and as Natural Guardian and Next Friend of HENRY MCSWAIN and ROMA MCSWAIN, Her Minor Children, Plaintiffs,

vs.

HUGH WALLACE, WILL WALLACE, VERGE MCGOODWIN, CHAS. SHANNON, JOHN HUNT, JOHN PERKINS, and B. C. HILL, Defendants.

Petition for Writ of Error.

And now come Hugh Wallace, Will Wallace, Verge McGoodwin, Chas. Shannon, John Hunt, John Perkins and B. C. Hill, defendants herein, and say that on or about the 8th day of April, 1905, this court entered judgment herein, in favor of the plaintiff, and against these defendants, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed, to the prejudice of these defendants, all of which will more in detail appear, from the assignment of errors, which is filed with this petition.

Wherefore these defendants pray that a writ of error may issue in this behalf, out of the United States Court of Appeals for the Indian Territory, for the correction of errors, so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Court of Appeals.

CRUCE, CRUCE & BLEAKMORE,
Attorneys for Defendants.

The writ of error as herein prayed for is allowed, and, upon the defendants giving bond, according to law, in the sum of 500 Dollars the same shall operate as a supersedeas bond.

HOSEA TOWNSEND,
Judge of the United States Court for the Southern
17 *District of the Indian Territory.*

Endorsed on back: No. 5982. Mrs. Ella Adams *et al. vs.* Hugh Wallace, *et al.* Petition for Writ of Error and order allowing the same.

In the United States Court for the Southern District of the Indian Territory at Ardmore.

MRS. ELLA ADAMS ET AL.
vs.
HUGH WALLACE ET AL.

Assignment of Error.

The defendants, in connection with their petition for a writ of error, make the following assignemant of error, which they aver occurred upon the trial of the cause, to wit:

The Court erred in sustaining the demurrer to the second amended answer of Hugh Wallace, Will Wallace, Verge McGoodwin, Chas. Shannon, John Hunt and John Perkins.

2d. The Court erred in sustaining the demurrer to the second amended answer of the defendant, B. C. Hill.

3d. The Court erred in rendering judgment for the plaintiff and against the defendants herein.

4th. The Court erred in overruling defendants' motion for a new trial.

Wherefore the defendants pray that the judgment of the United States Court for the Southern District of the Indian Territory may be reversed.

CRUCE, CRUCE & BLEAKMORE,
Attorneys for Defendants.

Endorsed on back: No. 5982. Mrs. Ella Adams *et al. vs.* Hugh Wallace, *et al.* Assignment of Error.

In the United States Court for the Southern District of the Indian Territory at Ardmore.

UNITED STATES OF AMERICA,
18 *Southern District, Indian Territory, ss:*

The President of the United States to the Honorable Judge of the United States Court for the Southern District of the Indian Territory, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you between Mrs. Ella Adams, for herself and as natural guardian and next friend of Henry McSwain and Roma McSwain, her minor children, plaintiffs, and Hugh Wallace, Will Wallace, Verge McGoodwin, Chas. Shannon, John Hunt, John Perkins and B. C. Hill, defendants, a manifest error has happened, to the great damage of the said defendants, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done, to the parties aforesaid in this behalf,

do command you, if judgment be therein given, that then under your seal, d-stinctly and openly, you send the record and proceeding aforesaid, with all things concerning same, to the United States Court of Appeals for the Indian Territory, together with this writ, so that you have the same at South McAlester, in the said Indian Territory, on or before sixty days from the date hereof, in the said United States Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the 24th day of April, 1905.

Witness my hand and seal, as Clerk of said Court.

C. M. CAMPBELL,
Clerk of the U. S. Court for the Southern District of I. T.

Allowed by
HOSEA TOWNSEND,
Judge of said Court.

Endorsed on back: No. 5982. Mrs. Ella Adams, *et al.*, *vs.* Hugh Wallace, *et al.* Writ of Error.

In the United States Court for the Southern District of the Indian Territory at Ardmore.

19 UNITED STATES OF AMERICA, *Southern District, Indian Territory:*

Citation in Error.

To Mrs. Ella Adams, for yourself, and as next friend and natural guardian of Henry McSwain and Roma McSwain, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Court of Appeals for the Indian Territory, to be holden in the City of South McAlester, in said Territory, on or before sixty days from date hereof, pursuant to a writ of error filed in the Clerk's office of the United States Court for the Southern District of the Indian Territory, wherein Hugh Wallace, Will Wallace, Verge McGoodwin, Chas. Shannon, John Hunt, John Perkins and B. C. Hill, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Hosea Townsend, Judge of the United States Court for the Southern District of the Indian Territory, this 24th day of April, 1905.

HOSEA TOWNSEND,
Judge of the United States Court for the Southern District of Indian Territory.

I, H. H. Brown, attorney of record for the within named Ella Adams, Henry McSwain, and Roma McSwain, plaintiffs in the original suit, and defendants in error, hereby accept service of the within citation, and waive all further notice in the premises.

H. H. BROWN,
Attorney for Defendant in Error.

Endorsed on back: No. 5982. Mrs. Ella Adams, *et al.*, *vs.* Hugh Wallace. Citation in Error.

THE UNITED STATES OF AMERICA, *Southern Judicial District*
20 *of the Indian Territory:*

In pursuance of the command of the writ of error within, I, C. M. Campbell, Clerk of the United States Court, Southern District, Indian Territory, do herewith transmit a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case of Ella Adams *et al. vs.* Hugh Wallace, lately pending in the United States Court for the Southern District of the Indian Territory at Ardmore, under my hand and seal of said Court.

Witness my official signature, and the seal of said Court at the city of Ardmore, in said District, this 26th day of April, in the year of our Lord, One Thousand, Nine Hundred and Five and of the Independence of the United States of America, the One Hundred and Twenty-Eighth.

[SEAL.]

C. M. CAMPBELL,
Clerk United States Court, Southern District, Indian Territory.

No. 626. Hugh Wallace, *et al.*, Appellants, *vs.* Mrs. Ella Adams, *et al.*, Appellees. Filed in the Office of Clerk of U. S. Court of Appeals Ind. Ter., April 28, 1905. W. P. Freeman, Clerk.

21 And afterwards, to-wit: on the 15th day of June, A. D. 1905, the Appellants filed their motion to have this cause decided at the June Term, 1905, of the Court of Appeals in the Indian Territory, which said motion is in words and figures following, to-wit:

In the United States Court of Appeals for the Indian Territory, June Term, 1905.

No. 626.

HUGH WALLACE ET AL., Appellants,
vs.
MRS. ELLA ADAMS ET AL., Appellees.

Motion.

The appellants state that living in the Choctaw and Chickasaw Nations are nearly three thousand people claiming rights similar to those insisted upon by the appellants in this case, and whose con-

tentions will be determined by the judgment herein. It is desirable to get the judgment of the Supreme Court upon the questions involved in this case, and the appellants therefore respectfully request this Court to decide this case at its present sitting.

CRUCE, CRUCE AND BLEAKMORE,
Attorneys for Appellants.

Endorsed: No. 626. Hugh Wallace *et al.*, Appellants, *vs.* Mrs. Ella Adams *et al.*, Appellees. United States Court of Appeals, June Term, 1905. Motion. Filed in the office of Clerk of U. S. Court of Appeals, Ind. Ter., June 15, 1905. Wm. P. Freeman, Clerk.

And afterwards, to-wit: on the 16th day of June, A. D. 1905, said United States Court of Appeals in the Indian Territory handed down *in* its opinion in said cause, which is in the words a-d figures following, to-wit:

In the United States Court of Appeals in the Indian Territory.

No. 626.

HUGH WALLACE ET AL., Appellants,
vs.
ELLA ADAMS ET AL., Appellees.

Appeal from the United States Court for the Southern District of the Indian Territory.

Hon. Hosea Townsend, Judge presiding.
Cruce, Cruce & Bleakmore, for Appellants.
H. H. Brown, for Appellees.

22 *Per Curiam:*

The main question presented by this appeal is one involving the constitutionality of sections 31, 32 and 33, of the Act of Congress of July 1, 1902. These sections are as follows:

It being claimed and insisted by the Choctaw and Chickasaw nations that the United States courts in the Indian Territory, acti-g under the Act of Congress approved June 10, 1896, have admitted persons to citizenship or enrollment as such citizens in the Choctaw and Chickasaw nations respectively, without notice of the proceedings in such courts being given to each of said nations; and it being insisted by said nations that, in such proceedings, notice to each of said nations was indispensable, and it being claimed and insisted by said nations that the proceedings in the United States courts in the Indian Territory, under the said Act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commission, and should not have extended to a trial *de novo* of the question of citizenship; and it being desirable to finally

determine these questions, the two nations, jointly, or either of said nations acting separately and making the other a party defendant, may, within 90 days after this agreement becomes effective, by a bill in equity filed in the Choctaw and Chickasaw citizenship court hereinafter named, seek the annulment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship or enrollment by said courts, with notice to one but not to both of said nations, shall be made defendants to said suit as representatives of the entire class of persons similarly situated, the number of such persons being too numerous to require all of them to be made individual parties to the suit; but any person so situated may, upon his application, be made a party defendant to the suit. Notice of the institution of said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant as aforesaid, and upon each of said ten representative defendants, and shall also be published for a period of four weeks in at least two weekly newspapers having general circulation in the Choctaw and Chickasaw nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering the same, which shall not be less than thirty days after the last publication. Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizenship or enrollment by
23 said United States courts in the Indian Territory was wrongfully obtained as provided in the next section. In the event said citizenship judgments or decisions are annulled or vacated in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers and proceedings in any citizenship case in which the judgment or decision is so annulled or vacated, shall, upon written application therefore, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said citizenship court by the court having custody and control of such files, papers and proceedings, and, upon the filing in such citizenship court of the files, papers and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification thereof has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision has been rendered therein.

Said citizenship court shall also have appellate jurisdiction over all judgments of the courts in Indian Territory rendered under said Act of Congress of June tenth, eighteen hundred and ninety-six, admitting persons to citizenship or to enrollment as citizens in either of said nations. The right of appeal may be exercised by the said nations jointly or by either of them acting seperately at any time within six months after this agreem-nt is finally ratified. In the

exercise of such appellate jurisdiction said citizenship court shall be authorized to consider, review and revise all such judgments, both as to findings of fact and conclusions of law, and may, wherever in its judgment substantial justice will thereby be subserved, permit either party to any appeal to take and present such further evidence as may be necessary to enable said court to determine the very right of the controversy. And said court shall have power to make all needful rules and regulations prescribing the manner of taking and conducting said appeals and of taking additional evidence therein. Such citizenship court shall also have like appellate jurisdiction and authority over judgments rendered by such courts under the said act denying claims to citizenship, or to enrollment as citizens, in either of said nations. Such appeals shall be taken within the time hereinbefore specified and shall be taken, conducted and disposed
24 of in the same manner as appeals by the said nations, save that notice of appeals by citizenship claimants shall be served upon the chief executive officer of both nations. Provided, that paragraphs thirty-one, thirty-two and thirty-three hereof shall go into effect immediately after the passage of this Act by Congress.

A court is hereby created, to be known as the Choctaw and Chickasaw Citizenship Court, the existence of which shall terminate upon the final determination of the suits and proceedings named in the last two preceding sections, but in no event later than the thirty-first day of December, nineteen hundred and three. Said court shall have all authority and power necessary to the hearing and determination of the suits and proceedings so committed to its jurisdiction, including the authority to issue and enforce all requisite writs, process and orders, and to prescribe rules and regulations for the transaction of its business. It shall also have all the powers of a Circuit Court of the United States in compelling the production of books, papers and documents, the attendance *the production of books papers and documents, the attendance* of witnesses and in punishing contempt. Except where herein otherwise expressly provided, the pleadings, practice and proceedings in said court shall conform, as near as may be, to the pleadings, practice and proceedings in equity cases in the Circuit Courts of the United States. The testimony shall be taken in court or before one of the judges so far as practicable. Each judge shall be authorized to grant, in vacation or recess, interlocutory orders and to hear and dispose of interlocutory motions not affecting the substantial merits of the case. Said court shall have a chief judge and two associate judges, a clerk, and a bailiff. The judges shall be appointed by the President, by and with the advice and consent of the Senate, and shall each receive a compensation of five thousand dollars per annum, and his necessary and actual traveling and personal expenses while engaged in the performance of his duties. The clerk, stenographer and bailiff shall be appointed by the judges, or a majority of them, and shall receive the following yearly compensation: Clerk, two thousand four hundred dollars; stenographer, twelve hundred dollars; bailiff, nine hundred dollars. The compensation of all these officers shall be paid by the United States in monthly installments. The moneys to pay said compensations are hereby appropriated, and there is also hereby appro-

priated the sum of five thousand dollars, or so much thereof as may be necessary, to be expended under the direction of the Secre-
25 tary of the Interior, to pay such contingent expenses of said court and its officers as to such Secretary may seem proper. Said court shall have a seal, shall sit at such place or places in the Choctaw and Chickasaw nations as the judges may designate, and shall hold public sessions, beginning the first Monday in each month, so far as may be practicable or necessary. Each judge and the clerk and deputy clerk shall be authorized to administer oaths. All writs and process issued by said court shall be served by the United States marshal for the district in which the service is to be had. The fees for serving process and the fees of witnesses shall be paid by the party at whose instance such process is issued or such witnesses are subpœnaed, and the rate or amount of such fees shall be the same as is allowed in civil causes in the Circuit Court of the United States for the Western District of Arkansas. No fees shall be charged by the clerk or other officers of said court. The clerk of the United States Court in Indian Territory having custody and control of the files, papers and proceedings in the original citizenship cases, shall receive a fee of two dollars and fifty cents for transferring and certifying to the Citizenship Court the files, papers and proceedings in each case, without regard to the number of persons whose citizenship is involved therein, and said fee shall be paid by the person applying for such transfer and certification. The judgment of the Citizenship Court in any or all of the suits or proceedings so committed to its jur-diction shall be final. All expenses necessary to the proper conduct, on behalf of the nations, of the suits and proceedings provided for in this and the two proceeding sections shall be incurred under the directions of the executives of the two nations, and the Secretary of the Interior is hereby authorized, upon certificate of said executives, to pay such expenses as in his judgment are reasonable and necessary out of any of the joint funds of said nations in the Treasury of the United States.

This court, after examination of the record, is of opinion Congress had the power to enact the provisions above set out and they are not in conflict with the Constitution of the United States, and the opinion of the Court below is, therefore, affirmed.

Townsend, J., did not sit in the cause.

Endorsed: No. 626. Filed in the office of Clerk of U. S. Court of Appeals, Ind. Ter., June 16, 1905. Wm. P. Freeman, Clerk.

Upon which opinion the said Court rendered and caused to be entered the following judgment in said cause, to-wit:

26 HUGH WALLACE ET AL., Appellants,
vs.
MRS. ELLA ADAMS ET AL., Appellees.

Appeal from United States Court, Southern District, Indian Territory.

This cause came on to be heard upon the transcript of the record of the United States Court for the Southern District of the Indian Territory and was argued by counsel, on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said court for the Southern District in this cause.

It is therefore considered by the court that the judgment of said Court for the Southern District, in this cause rendered, be and the same is hereby in all things affirmed with costs.

It is further considered that said appellees recover of said appellants all their costs in this court in this cause expended, and have execution thereof.

And afterwards, to-wit: on the 7th day of August, said appellants filed in the office of the Clerk of the said Court their petition for a writ of error, which, with endorsements thereon, is in the words and figures following, to-wit:

In the United States Court of Appeals for the Indian Territory.

Petition for Writ of Error.

MRS. ELLA ADAMS, for Herself and as Natural Guardian and Next Friend of HENRY MCSWAIN and ROMA MCSWAIN, Her Minor Children, Plaintiffs,
vs.
HUGH WALLACE, WILL WALLACE, VERGE MCGOODWIN, CHAS. SHANNON, JOHN HUNT, JOHN PERKINS and C. B. HILL, Defendants.

And now comes Hugh Wallace, Will Wallace, Verge McGoodwin, Chas. Shannon, John Hunt, John Perkins and B. C. Hill, defendants below and appellants herein and say that on or about the 16th day of June, 1905, this court entered judgment herein, in favor of the plaintiffs, appellees, and against the defendants, appellants, affirming the judgment of the trial court, in which judgments and the proceedings had prior thereto in this cause, certain errors were committed, to the prejudice of these defendants, appellants, all of which will in more detail appear, from the assignment of errors filed with this petition.

27 Wherefore these defendants pray that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Eighth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers

in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

CRUCE, CRUCE AND BLEAKMORE,
Attorneys for Appellants.

Writ of Error allowed this 7th day of August, A. D. 1905, and cost bond fixed at Five Hundred Dollars.

WM. H. H. CLAYTON,
Associate Justice, United States Court of Appeals in the Indian Territory.

Endorsed: Mrs. Ella Adams, *et al. vs.* Hugh Wallace, *et al.* Petition for writ of error. Filed in the office of Clerk of U. S. Court of Appeals Ind. Ter., Aug. 7, 1905. Wm. P. Freeman, Clerk.

And afterwards, to-wit: on said 7th day of August said appellants filed in the office of the Clerk of said court their assignments of error in said cause, which is in the words and figures following, to-wit:

In the United States Court of Appeals for the Indian Territory.

Assignment of Errors.

MRS. ELLA ADAMS ET AL.
vs.
HUGH WALLACE ET AL.

The appellants, in connection with their petition for a writ of error, make the following assignments of error, which they aver occurred in the hearing of this cause, to-wit:

1st. The trial court erred in sustaining the demurrer to the second amended answer of Hugh Wallace, Will Wallace, Verge McGoodwin, Chas. Shannon, John Hunt and John Perkins.

2nd. The trial court erred in sustaining the demurrer to the second amended answer of the defendant B. C. Hill.

3rd. The trial court erred in rendering judgment for the plaintiffs and against the defendants.

4th. The trial court erred in overruling the defendants' motion for a new trial.

28 5th. The United States Court of Appeals for the Indian Territory erred in affirming the judgment of the trial court.

Wherefore appellants pray that the judgment of the United States Court of Appeals for the Indian Territory, as well as the judgment of the United States Court for the Southern District of the Indian Territory may be reversed.

CRUCE, CRUCE AND BLEAKMORE,
Attorneys for Appellants.

Endorsed: Mrs. Ella Adams, *et al. vs.* Hugh Wallace, *et al.* Assignment of errors. Filed in the office of Clerk of U. S. Court of Appeals, Ind. Ter., Aug. 7, 1905. Wm. P. Freeman, Clerk.

And afterwards, to-wit: On the 9th day of August, said appellants filed in the office of the Clerk of said court their cost bond in said cause, which is in the words and figures following, to-wit:

In the United States Court of Appeals for the Indian Territory.

No. 626.

HUGH WALLACE ET AL.
vs.
MRS. ELLA ADAMS ET AL.

Know all men by these presents: That we, Hugh Wallace, Will Wallace, Verge McGoodwin, Chas. Shannon, John Hunt, John Perkins, B. C. Hill and Lee Cruce are held and firmly bound unto Mrs. Ella Adams, for herself and as natural guardian and next friend of Henry McSwain and Roma McSwain, in the full and just sum of Five Hundred Dollars ($500), to be paid to the said Mrs. Ella Adams, her heirs, executors, administrators and assigns, to which payment well and truly to be made, we bind ourselves, heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 8th day of August, 1905.

Whereas, lately at the June 1905 term of the United States Court of Appeals for the Indian Territory in a suit depending in said court between Hugh Wallace, Will Wallace, Verge McGoodwin, Chas. Shannon, John Hunt, John Perkins, B. C. Hill, appellants and Mrs. Ella Adams, for herself and as natural guardian and next friend of Henry McSwain and Roma McSwain, her minor children, appellees, judgment was rendered against the appellants, and the said appellants have obtained a writ of error in the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said Mrs. Ella Adams, citing her to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

29 Now, the condition of the above obligation is such that if the said Hugh Wallace, Will Wallace, Verge McGoodwin, Chas. Shannon, John Hunt, John Perkins, and B. C. Hill shall prosecute said writ of error to effect and answer all damages and costs if they fail to make good their plea then the above obligation to be void, else to remain in full force and effect.

Signed and sealed in the presence of

HUGH WALLACE,
WILL WALLACE,
VERGE McGOODWIN,
CHAS. SHANNON,
JOHN HUNT,
JOHN PERKINS,
B. C. HILL,
By W. I. CRUCE, *Att'y.*
LEE CRUCE.

Approved by:
WM. H. H. CLAYTON,
Associate Justice U. S. Court of Appeals, I. T.

Endorsed: No. 626. Hugh Wallace, *et al.*, Appellants, *vs.* Mrs. Ella Adams *et al.*, Appellees. Cost Bond. Filed in the office of Clerk of U. S. Court of Appeals, Ind. Ter., Aug. 9, 1905. Wm. P. Freeman, Clerk.

UNITED STATES OF AMERICA, *Indian Territory, in the Court of Appeals, ss:*

I, William P. Freeman, Clerk of the United States Court of Appeals in the Indian Territory, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings, together with all things concerning the same, of the said Court, in the cause therein named, as fully as the same remains of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at office in the city of South McAlester, Indian Territory, this 10th day of August, A. D. 1905.

[Seal United States Court of Appeals in the Indian Territory.]

WM. P. FREEMAN,
Clerk United States Court of Appeals in the Indian Territory.

Filed Aug. 21, 1905.

JOHN D. JORDAN, *Clerk.*

30 *(Appearance of Counsel for Plaintiffs in Error.)*

And on the twenty-first day of August, A. D. 1905, the appearance of counsel for the plaintiffs in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2313.

HUGH WALLACE ET AL., Plaintiffs in Error,
vs.
MRS. ELLA ADAMS, for Herself and as Natural Guardian and Next Friend of HENRY MCSWAIN and ROMA MCSWAIN, Her Minor Children.

The Clerk will enter my appearance as Counsel for the Plaintiffs in Error.

WILLIAM I. CRUCE.
ANDREW C. CRUCE.
WILLARD R. BLEAKMORE.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2313. Hugh Wallace, *et al.*, Pl'ffs in Error, *vs.* Mrs. Ella Adams, &c. Appearance. Filed Aug. 21, 1905, John D. Jordan, Clerk. William I. Cruce, Andrew C. Cruce, Willard R. Bleakmore, Counsel for Pl'ffs in Error.

(Appearance of Counsel for Defendants in Error.)

And on the twenty-first day of October, A. D. 1905, the appearance of counsel for the defendants in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2313.

HUGH WALLACE ET AL., Plaintiffs in Error,
vs.
MRS. ELLA ADAMS ET AL.

The Clerk will enter my appearance as Counsel for the De-
31 fendants in Error.

H. H. BROWN.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2313. Hugh Wallace, *et al.*, Pl'ffs in Error, *vs.* Mrs. Ella Adams *et al.* Appearance. Filed Oct. 21, 1905, John D. Jordan, Clerk. H. H. Brown, Ardmore, Ind. Ter., Counsel for Def'ts in Error.

(Stipulation to Make Corrections in Transcript of Record.)

And on the fourth day of December, A. D. 1905, a stipulation to make correction in transcript of record was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

Number 2313.

HUGH WALLACE ET AL., Plaintiffs,
vs.
MRS. ELLA ADAMS ET AL., Defendants.

We have examined the decree of the United States Court for the Southern District of the Indian Territory, in the case of J. M. Hill *et al. vs.* the Choctaw Nation, as well as the second amended answer of the defendant, and the bill of exceptions filed herein, and we state to the court that in printing the record, an error has been committed by the printer, by omitting the name of B. C. Hill, after the name of Grover Hill, on page 5 of the transcript of the record herein.

In order to avoid the necessity of procuring a writ of certiorari, we agree that the record may be corrected by the Clerk of this Court's

inserting the name of B. C. Hill on page 5 of the record, just after the name Grover Hill.

CRUCE, CRUCE & BLEAKMORE,
Attorneys for Plaintiffs in Error.
H. H. BROWN,
Attorneys for Defendants in Error.

32 (Endorsed:) No. 2313. Hugh Wallace *et al.*, Pl'ffs in Error, *vs.* Mrs. Ella Adams *et al.* Stipulation to make correction in transcript of record. Filed Dec. 4, 1905, John D. Jordan, Clerk.

(Order of Submission.)

And on the fourth day of December, A. D. 1905, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1905.

MONDAY, *December* 4, 1905.

No. 2313.

HUGH WALLACE ET AL., Plaintiffs in Error,
vs.
MRS. ELLA ADAMS ET AL.

In Error to the United States Court of Appeals in the Indian Territory.

This cause having been called for hearing in its regular order, and counsel for defendants in error not being present to orally argue the same, the cause was taken as submitted on the brief filed in behalf of defendants in error. Thereupon the cause was argued by Mr. Andrew C. Cruce for the plaintiffs in error and the cause was submitted to the Court upon the transcript of record from said United States Court of Appeals in the Indian Territory and the briefs of counsel for the respective parties filed herein.

(Opinion.)

And on the twenty-first day of February, A. D. 1906, an opinion of said Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

33 United States Circuit Court of Appeals, Eighth Circuit.

No. 2313, December Term, A. D. 1905.

HUGH WALLACE ET AL., Plaintiffs in Error,
vs.
MRS. ELLA ADAMS, for Herself and as Natural Guardian and Next Friend of HENRY MCSWAIN and ROMA MCSWAIN, Her Minor Children, Defendants in Error.

In Error to the United States Court of Appeals in the Indian Territory.

Mr. A. C. Cruce (Mr. W. I. Cruce and Mr. W. R. Bleakmore were with him on the brief) for plaintiffs in error.

Mr. Thomas Norman and Mr. H. H. Brown submitted a brief for defendants in error.

Mr. George A. Mansfield, Mr. J. F. McMurray and Mr. Melven Cornish filed a brief in behalf of the Choctaw and Chickasaw Nations as *amici curiæ*.

Before Sanborn, Hook and Adams, Circuit Judges.

Syllabus.

1. Citizenship in Indian Tribes—Power to Determine Legislative, Not Judicial.—The power conferred upon the Dawes Commission and the United States Courts in the Indian Territory by the act of June 10, 1896, 29 Stat. 339, 340, and upon the Supreme Court by the act of July 1, 1898, 30 Stat. 591, to determine who were citizens of the Choctaw and Chickasaw nations, was legislative and not judicial, and judgments thereunder were subject to any subsequent legislation of the United States respecting the question of citizenship, which was enacted before allotments of lands were made to successful litigants.
2. Same—Judgments of Citizenship Confer no Vested Rights against United States Before Allotments.—Claimants of citizenship who secured judgments in their favor, which were final under these acts when they were rendered, and took possession of, and demanded suitable lands as their allotments, before their judgments were made reviewable, acquired no vested rights therein against subsequent legislation enacted before the lands
34 were allotted to them.

3. Same—Judgments of Citizenship Reviewable by Subsequent Act of Congress, Otherwise Conclusive on Parties.—The judgments of citizenship rendered by the courts were conclusive upon the parties in the absence of subsequent legislation, but, though final when rendered, were voidable and reviewable by subsequent acts of Congress enacted before allotments of land were made under them.
4. Citizenship Court—Act of July 1, 1902, Creating, Constitutional and Valid.—The act of July 1, 1902, 32 Stat. 641, whereby a citizenship court was created and empowered to review the final judgments of the courts of the United States under the act of June 10, 1896, which had been affirmed by the Supreme Court, was constitutional and valid against successful litigants who had not procured allotments before its passage.
5. Territorial Courts Legislative, Not Constitutional.—The United States Courts in the territories and the Supreme Court in reviewing their decisions do not exercise the judicial power granted by article 3 of the Constitution, but a jurisdiction conferred upon them by the legislative department of the Government by virtue of the sovereignty of the nation and the authority granted to Congress by section 3, article 4, of the Constitution, to dispose of, and make all needful rules and regulations respecting the territory belonging to the United States.
6. Courts of Indian Territory Have Jurisdiction of Ejectment for Indian Allotment.—The United States Courts in the Indian Territory have jurisdiction of an action of ejectment brought by an Indian allottee against one in possession of his allotment.
7. Indian Allotment—Title of Allottee Chargeable in Equity in those Courts with Trust for Rightful Claimant.—The United States Courts in the Indian Territory have jurisdiction in equity to charge the legal title to land evidenced by a certificate of allotment issued by the Dawes Commission under the direction of the Secretary of the Interior, with a trust in favor of the rightful claimant, either on account of an error of the commission in the construction of the law, or its misapprehension of the facts induced through fraud or gross mistake.
8. Allotment by Dawes Commission or Like Effect as Patent by Land Department.—The jurisdiction of the Dawes Commission, under the direction of the Secretary of the Interior, and the effect of their action in the allotment of lands of the Choctaw and Chickasaw nations are the same as the jurisdiction and the effect of the action of the land department of the United States in the disposition by patent of the public lands within its control.
9. Jurisdiction of Person Presumed from Recital in Decree of Service of Notice.—The recital in a judgment or decree that a re-
35 quired notice was "given to the defendants in conformity of law" raises the presumption of due service and of jurisdiction of the persons in the absence of any inconsistent record or evidence.

SANBORN, *Circuit Judge,* delivered the opinion of the court:

This case is presented to test the validity of the decree of the Choctaw and Chickasaw citizenship court of December 17, 1902, which by its terms annulled all the judgments and decisions of the United States Courts in the Indian Territory which had admitted persons to citizenship under the act of June 10, 1896, in either the Choctaw or Chickasaw nation of Indians. These nations were the owners of a large and valuable tract of land in common, so that each and every member of each tribe had an equal undivided interest in the whole. Treaty with the Choctaw nation of September 27, 1830, article II, 7 Stat. 333; Treaty with the Choctaws and Chickasaws of June 22, 1855, articles I, II and III, 11 Stat. 611, 612. By the act of March 3, 1893, the Commission to the Five Civilized Tribes, generally known as the Dawes Commission, was created and empowered to negotiate an extinguishment of the tribal title to these lands and an allotment thereof to the members of the tribes in severalty. 27 Stat. 645, c. 209, §16. As soon as the allotment of these lands to the members of the tribes in severalty became imminent, citizenship therein became desirable. Many sought membership in the tribes whose claims to that relation were not conceded by the nations and it became necessary to determine in some way who were the lawful citizens of these Indian tribes. Each nation had a roll of its acknowledged citizens and each denied the right of many applicants to membership. In this state of the case, the United States, by the act of June 10, 1896, 29 Stat. 339, 340, c. 398, (1) confirmed the rolls of citizenship of the tribes as they then existed, (2) authorized and required the Dawes Commission to hear the application and to determine the right of each applicant for citizenship in either of these tribes, (3) granted an appeal to the United States District Court in the Indian Territory to each party aggrieved by a decision of the commission upon this issue of citizenship, (4) declared that the judgment of that court should be final, and (5) required the commission to make a complete roll of the citizens of each of the tribes and to include therein the names of those whose rights of citizenship should be sustained by the courts. Hill, one of the defendants below in this action, and the only one whose rights it is necessary to consider because all the other defendants claim under him, was not enrolled or acknowledged by the Choctaw nation as one of its citizens, but was in fact a member of the tribe by blood and entitled to all the rights of a citizen therein. He applied to the Dawes Commission to be admitted to membership, the commission denied his application, he appealed to the United States Court for the Southern District of the Indian Territory and on March 8, 1898, that court adjudged that he was a member of the Choctaw tribe by blood and that he should be admitted thereto as a citizen. Immediately thereafter and during that month he took possession of the land which is the subject of this action. This land is a tract not more valuable or extensive than he would be entitled to receive as his allotment if he were

enrolled as a citizen of the Choctaw nation. Before June,
36 1898, he placed improvements of the value of at least $1000 upon this land and has ever since retained the possession thereof with the intent to secure the same as his allotment.

On June 28, 1898, and while he was thus in possession of the land, Congress passed an act whereby it consented to the Atoka agreement with the Choctaw and Chickasaw nations of April 23, 1897, empowered the Dawes Commission to allot the lands of these tribes to their members in severalty and provided that any member should be entitled to receive his allotment out of the lands in his possession if he chose to do so. 30 Stat. 495, 498. Hill made this choice. On July 1, 1898, Congress granted to the tribes an appeal to the Supreme Court from the judgment of March 8, 1898, in favor of Hill, and from all other judgments in the United States Courts in the Indian Territory in citizenship cases which involved the constitutionality or validity of any legislation affecting citizenship or the allotment of Indian lands. 30 Stat. 591, c. 545. The Choctaw nation appealed from the judgment in favor of Hill and his judgment was affirmed by the Supreme Court on May 15, 1899. Stephens *v.* Cherokee Nation, 174 U. S. 445. In the proceedings which resulted in judgments of admission to citizenship in either the Choctaw or the Chickasaw nation in the United States Courts notice had been given to only one of these nations and the courts had tried the actions upon the appeals *de novo*. The Indian nations insisted that these proceedings were erroneous and that the judgments were therefore unjust. On March 21, 1902, an agreement was made between the United States and the Choctaw and Chickasaw nations, which was confirmed by the act of Congress of July, 1902. 32 Stat. 641. This agreement and act were to the effect that the Choctaw and Chickasaw citizenship court, to be composed of three judges to be appointed by the President and confirmed by the Senate, should be created, that this court, upon the institution of a suit in equity therein by either or both of these tribes against ten persons who had been admitted to citizenship or enrollment by the terms of the judgments of the United States courts in the Indian Territory, as representatives of all persons similarly situated, should inquire and determine (1) whether or not notice to each of the two nations was indispensable to the proceedings and judgments of admission to citizenship in those courts, (2) whether the proceedings of those courts should have been confined to a review of the action of the Dawes Commission upon the papers and evidence submitted to it or should have extended to a trial of the actions *de novo*, and (3) whether or not the judgments of the United States Courts should be annulled on account of either or both of these alleged irregularities. The act and agreement also provided that in case the citizenship court should decide that the judgments of admission to citizenship by the United States Courts in the Indian Territory should be annulled or vacated, the papers in any action and that suit, wherein such a judgment had been rendered, should, upon seasonable application of either party, be transferred to the citizenship court which should proceed to a hearing and determination of it as the United States Court ought to have

proceeded, that the citizenship court should have appellate jurisdiction of the judgments of the United States courts in citizenship cases and that its judgments should in all cases be final. Under this agreement and act the two nations brought a test suit in this citizenship court against J. W. Riddle and nine other persons who had
37 been adjudged entitled to citizenship by the courts, as representatives of all others similarly situated, and on December 17, 1902, they obtained a decree from that court to the effect that the judgments of the United States Courts in the Indian Territory whereby persons were admitted to citizenship in the Choctaw and Chickasaw nations, under the act of June 10, 1896, were annulled and vacated. The defendant, Hill, did not apply for a transfer to the citizenship court of the action in which he had secured his judgment and no further proceedings were taken therein.

The action now in this court is an action of ejectment. Henry McSwain and Roma McSwain by their guardian and next friend were the plaintiffs below and they are acknowledged citizens of the Chickasaw nation who have received allotments of these lands from the Dawes Commission and have brought this action against Hill and those claiming under him to recover possession of them. Hill has presented his judgment in the United States Court to the Dawes Commission, has demanded his enrollment as a citizen of the Choctaw nation and the allotment to him of the land in dispute, but the commission has refused his request on the sole ground that his judgment was annulled by the decree of the citizenship court. Hill insists that that decree is void and under the legislation which has been recited he is entitled to retain possession and to receive the land in dispute as his allotment unless his judgment of admission as a citizen of the Choctaw nation has been avoided by that decree. The facts which have been recited appear in the complaint and answer in the action in hand or have been admitted by counsel in their briefs, and the defendant, Hill, prayed in his answer that the case be transferred to the equity docket, that his title be quieted and that he have all other proper relief. A demurrer to his answer was sustained by the trial court and by the appellate court in the Indian Territory.

We are met at the threshold of the investigation of this case by the objection that the United States Court for the Southern District of the Indian Territory had no jurisdiction of this action because the land in dispute had been allotted to the plaintiffs by the Dawes Commission and by the act of July 1, 1902, exclusive jurisdiction had been conferred upon that commission to determine under the direction of the Secretary of the Interior all matters relating to the allotment of land and to issue allotment certificates which should be conclusive evidence of the right of the allottee to the land therein described, and authority was given to the Indian agent at Union Agency to place allottees in possession of their lands upon application to him, free from the writ or process of any court. 32 Stat. 641, pars. 23, 24. No application, however, appears to have been made to the Indian agent to place the plaintiffs in possession of the land here in dispute and the rights and powers of the agent are not in question in this case. The plaintiffs commenced an action of

ejectment in the trial court below which was met by the plea that in equity and good conscience the land which was its subject and the possession thereof were the property of the defendant and by a prayer for proper relief in equity. Jurisdiction of such an action was clearly granted to the courts in the Indian Territory by the act of June 7, 1897, 30 Stat. 83, which provides that on and after January 1, 1898, those courts shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted, as well as by section 3 of the act of June 28, 1898, 30 Stat. 496, c. 517.

38 Nor did the grant to the Dawes Commission and to the Secretary of the Interior of exclusive jurisdiction to determine matters relating to the allotment of land and to issue certificates which are conclusive evidence of the right of the allottee to the land therein described, deprive those courts of their jurisdiction in equity, after the commission and the secretary have exercised this power and exhausted their jurisdiction, to determine whether by error of law or through fraud or gross mistake the commission and the secretary have failed to allot the land to the party who was under the law entitled to it and have assigned it to one who had no right to it. The jurisdiction of the commission and of the secretary and the effect of their action in the allotment of the lands of the Choctaw and Chickasaw nations are the same in effect as the jurisdiction and effect of the action of the land department of the United States in the disposition of the public lands within its control. The commission under the direction of the secretary constitutes a special tribunal vested with the judicial power to hear and determine the claims of all parties to allotments of these lands and to execute its judgments by the issue of the allotment certificates which constitute conveyances of the right to the lands to the parties who, it decides, are entitled to the property. This tribunal undoubtedly has exclusive jurisdiction to determine such claims and to issue such a conveyance. The allotment certificate when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal, empowered to decide the question, that the party to whom it issues is entitled to the land, and it is a conveyance of the right to this title to the allottee. U. S. *v.* Winona & St. Peter R. Co., 11 C. C. A. 96, 103, 67 Fed. 948, 955. Like a patent it is impervious to collateral attack. But, as in the case of a patent, if the commission or the secretary has been induced to issue the allotment certificate to the wrong party by an erroneous view of the law or by a gross or fraudulent mistake of the facts, the rightful claimant is not remediless. He may avoid the decision and charge the legal title to the lands in the hands of the allottee, as he may that of the grant to a patentee, with his equitable right to it either on the ground that upon the facts found, conceded or established without dispute at the hearing before the special tribunal, its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the certificate to him and to give it to another, or that through fraud or gross mistake it fell into a misapprehension of the facts proved before it which had a like effect. James *v.* Germania Iron Co., 46 C. C. A. 476,

479, 107 Fed. 597, 600. In the case in hand all parties concede in the briefs which have been submitted for our consideration that the land in question has been allotted and that allotment certificates have been issued to the plaintiffs and the questions presented will be considered in view of this admission. The defendant avers that the commission failed to allot the land to him and assigned it to the plaintiffs by reason of its erroneous view of the law in that it held that his judgment of March 8, 1898, was vacated by the decree of the citizenship court. If that ruling was erroneous the defendant was entitled to the possession of the property and to a decree in equity that the right and title which the plaintiffs had secured by the allotment certificates were held by them in trust for his benefit and the court in the Indian Territory had ample power to grant this relief.

39 Attention is called to section 2 of the act of June 28, 1898, 30 Stat. 495, which provides that when in the progress of any civil suit in the United States Court in any district in the Indian Territory it shall appear to the court that the property of any Indian tribe is in any way affected by the issues being heard the court is authorized and directed to make such tribe a party, and it is contended that both by virtue of this provision and under the general rule in equity the Choctaw and Chickasaw tribes were indispensable parties to this action. But the lands in controversy here have been allotted to the plaintiffs below. They are no longer the property of the tribes and none of their property can in any way be affected even remotely by this action unless the averments of the answer entitle the defendant to relief. The courts below were of the opinion that they did not, and hence it did not appear to them that any property of the tribes would be affected by the issues in this action. Until their opinions in this regard are overruled it will not so appear, and if they should be, this case must be remanded for testimony and hearing and there will then be ample opportunity for them to consider and determine whether or not the Indian nations should be made parties. The record before us does not show that this question has yet been presented to the courts below and hence it is not now here for our consideration or decision. We come then to the crucial question in the case.

The Constitution of the United States had been extended over and put into effect in the Indian Territory before the legislation involved in this suit was enacted and counsel for the defendant, Hill, contend that because his judgment of admission to citizenship of March 8, 1898, was by the terms of the act of June 10, 1896, final when it was rendered and he took possession of and improved the land he occupies before June 28, 1898, and because by the act of the latter date, 30 Stat. 498, the right to select this land which was then in his possession as his allotment was granted to him, his right thereto then vested, so that Congress had no power either by direct enactment or by the creation of a commission or court to review or annul his judgment or to deprive him of his right to this allotment. In support of this position they cite Rutherford *v.* Greene's heirs, 2 Wheat. 196; Gaines *v.* Nicholson, 9 How. 356; U. S. *v.* Brooks, 10 How. 442; Doe *v.*

Wilson, 23 How. 457; Crews *v.* Burcham, 1 Black 352; Best *v.* Polk 18 Wall. 112; New York Indians *v.* U. S. 170 U. S. 1, and Jones *v.* Meehan, 175 U. S. 1. The argument is persuasive and it is fortified by the suggestions that the defendant's judgment had been affirmed by the Supreme Court in 1899 and that the citizenship court was in reality a commission and not a judicial tribunal. But none of the authorities cited contains a decision that one has a vested right in a judgment of citizenship which the legislative department of the United States may not lawfully disturb, although one of the ultimate consequences of such a judgment, if undisturbed, might be an interest in land and other property. The opinions in the cases cited are limited to rulings that grants to designated persons or classes of persons are grants *in praesenti* and that after they have taken effect the rights to the property have vested so that they may not be lawfully destroyed by legislation without compensation. The contention of counsel based upon decisions of this nature fails to give adequate consideration to the origin and character of the defendant's claim, to the nature of the issue determined by his judgment and to the relation of the legislative, executive and judicial departments of the United States to this claim and issue. Prior to the act of June 10, 1896, the right and the power to determine who were the citizens of the Choctaw and Chickasaw nations was vested in those tribes. It was one of the fast-disappearing attributes of the domestic dependent nationality of the Choctaws and Chickasaws, which was vested exclusively in their nations and was guaranteed to them by treaties with the United States. 7 Stat. 333, 334, §4; 11 Stat. 611, 612, art. 8; Buster *v.* Wright, 68 C. C. A. 505, 508, 135 Fed. 947, 950. Those nations had rejected the defendant's claim that he was a citizen of the Choctaw nation. That issue had become *res adjudicata* between him and the nations and it was not cognizable by the judiciary of the United States or of the Indian Territory. No court had any jurisdiction to determine that he was a member of the Choctaw tribe or that he should be admitted to citizenship therein. He was without remedy for the lawful refusal of the Choctaw nation to admit him to citizenship and hence without right to membership in that tribe.

The United States by its superior might took from the Choctaw and Chickasaw nations the power to determine who their citizens should be, which had been repeatedly guaranteed to them by treaties, and authorized the Dawes Commission and the United States Court in the Indian Territory to decide this issue, by the act of June 10, 1896. Here is the origin of every right of the defendant involved in this action. The maintenance by him of any claim in any court necessarily concedes the power of the legislative department of the Government to create or to revive, and to enforce his demand for citizenship, because without that concession the provisions of the act of June 10, 1896, in this regard, are void and the defendant's claim is conclusively adjudged to be baseless by its rejection by the Choctaw nation. But if the legislative department of the United States had the constitutional power to create or to revive the defendant's claim and to enforce it, it necessarily had the same power

to determine whether or not it would revive or enforce it and to select its own method of deciding these questions. It might have determined this issue itself and have declared by direct enactment that the defendant, Hill, was a citizen of the Choctaw nation. It might have empowered a committee, an Indian agent, a commission, a board or a court, to examine and determine that question on its behalf, and as the determination of this question of citizenship was a purely legislative and administrative function and not a judicial one, Congress necessarily had the authority under the Constitution at any time before an allotment of land under its previous acts had been finally made to the defendant and his right to the land had thereby become vested, to repeal its previous legislation, to change its method of determining the issue, to strike down any decision that had been made under its previous acts, to prescribe a new method of deciding the question, or to refuse to determine it altogether and leave the claim of the defendant as it found it, conclusively barred by its rejection by the Choctaw nation. A striking and persuasive analogy to the power of the legislative department of the Government to determine this question of citizenship and to dispose of the lands of the tribes is found in its jurisdiction to dispose of the public lands of the United States. Congress is vested with lawful authority to dispose of these lands. It has authorized the land department of the United States to decide who are entitled to them under the general pre-emption, homestead and other acts provided for their disposition.

But the legislative department of the United States may at
41 any time before one, who has occupied and improved land with a view to its pre-emption, has completed all the preliminaries, entered and paid for the land he seeks to acquire, lawfully convey it to another, although the land department has already decided that the occupant is entitled to it. Occupation, improvement, compliance with the law and the favorable decisions of the land department give rise to valuable and enforceable rights to public land as against other claimants in the absence of subsequent legislation. Nothing short of entry and payment confer upon a settler vested rights against the United States which impair in any respect the plenary power of its legislative department to dispose of the land to another or to withdraw it from sale for the use of the Government. Campbell *v.* Wade, 132 U. S. 34, 38; Frisbie *v.* Whitney, 9 Wall. 187, 192; Yosemite Valley case, 15 Wall 77, 78; Hosmer *v.* Wallace, 97 U. S. 575, 581; Gonzales *v.* French, 164 U. S. 338, 344; Grisar *v.* McDowell, 73 U. S. 363; Trenouth *v.* San Francisco, 100 U. S. 251; La Abra Silver Min. Co. *v.* U. S., 175 U. S. 423; Emblen *v.* Lincoln Land Co., 42 C. C. A. 499, 503, 102 Fed. 559, 563. In the case last cited the complainant had instituted a contest in the land department in the year 1888 against an entryman, Weed, to secure a cancellation of his entry and to obtain for the contestant the right to enter the land which is granted by section 2, chapter 89, 21 Stat. 140, to any person who procures the avoidance of a previous entry. After a long series of adverse decisions the secretary of the interior finally in 1894 set aside the rulings which had been made and directed the local land officer to hear

the case anew. The complianant had paid fees to the land officers, had conducted his contest for six years, had finally secured an avoidance of the decisions against him and was pressing the case to a hearing before the local land officers where a time had been set for the trial, when Congress passed an act to the effect that the entry of Weed was confirmed and that a patent should be issued to him forthwith. This court decided in accordance with the opinions of the Supreme Court in the cases cited above that the contestant had acquired no vested rights against the United States and its legislation and that the act of Congress which granted the land to another was neither unconstitutional nor invalid. The act of July 1, 1902, 32 Stat. 641, which created the citizenship court and authorized it to review the judgment of the United States Court in the Indian Territory of March 8, 1898, in favor of the defendant, was of the same nature. It was but a modification or an amendment of, or an addition to, the method prescribed by the legislative department of the Government for the determination of the question whether or not the defendant, Hill, was a citizen of the Choctaw nation by its acts of June 10, 1896, 29 Stat. 340, and July 1, 1898, 30 Stat. 591. When it was passed the Dawes Commission to whom Congress had delegated the power to distribute the lands of the tribes had not allotted the land in dispute to the defendant. He had therefore acquired no vested right in it as against subsequent legislation of the United States because until such an allotment was made all the proceedings determinative of citizenship and of distribution which derived their force and effect from the legislative power of the United States alone were necessarily subject to the further exercise of that authority.

The fact that the effect of the act of July 1, 1902, has been to avoid final judgments of the United States Courts in the Indian Territory, which had been affirmed by the Supreme Court, has not been disregarded. In the rendition of those judgments, however,
those courts were not exercising any of the judicial power of
42 the United States conferred by the third article of the Constitution. They were not constitutional, but legislative courts of the United States, exercising a jurisdiction conferred upon them by Congress by virtue of the sovereignty of the nation and of section 3 of article 4 of the Constitution, which empowers Congress to dispose of, and make all needful rules and regulations respecting the territory belonging to the United States. American Ins. Co. *v.* Canter, 1 Pet. 511, 546; Benner *v.* Porter, 9 How. 235, 242, 243; Hornbuckle *v.* Toombs, 18 Wall. 648, 655; Good *v.* Martin, 95 U. S. 90, 98; Clinton *v.* Englebrecht, 13 Wall. 434, 447. In the case last cited Chief Justice Chase, speaking of the courts of the then Territory of Utah, said: "There is no Supreme Court of the United States, nor is there any District Court of the United States, in the sense of the constitution, in the Territory of Utah." Now, as the power conferred upon the courts in the Indian Territory and upon the Supreme Court respecting the decision of the question who were citizens of the Indian tribes, was purely legislative and administrative and the entire question still remained subject to congressional action, the legislative department had the same power at any time before

allotments were made and the rights of allottees became vested, to disregard or to authorize a review of the decisions of these courts by other tribunals that it would have had to have disregarded or reviewed the decisions of an Indian agent, a commission, or a committee, if it had conferred this power upon them. The decisions of the Supreme Court in Stephens *v.* Cherokee Nation, 174 U. S. 445, 488, and Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 306, adequately sustain this conclusion. In the former case that court expressly decided that the defendant and others who had secured judgments of admission to citizenship under the act of June 10, 1896, which were final under the legislation in existence when they were rendered, had no vested rights therein or in the lands or property of the tribes to which these judgments would have entitled them, that the subsequent act of July 1, 1898, which gave to the tribes appeals to the Supreme Court from these judgments was constitutional and declared that "the lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion of any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms." Earlier decisions of that court are to the effect that the legislative department of the Government has ample power by subsequent enactment to grant a new trial or a review by a suitable tribunal of judgments final under the laws in force when they were rendered. Sampeyreac *v.* U. S., 7 Pet. 222, 235; Freeborn *v.* Smith, 2 Wall. 160; Garrison *v.* New York, 21 Wall. 196, 204; Freeland *v.* Williams, 131 U. S. 405, 412; Essex Public Road Board *v.* Skinkle, 140 U. S. 334. In Sampeyreac *v.* U. S., 7 Pet. 222, 235 a decree of a court which established a title to land was rendered on November 24, 1827. After this decree had become final under existing laws an innocent purchaser bought the established title. On May 8, 1830, Congress passed an act which authorized the claimants defeated by the original decree, which had then been final for more than two years, to maintain a bill of review to set it aside. Such a bill was exhibited, a decree was rendered thereon which avoided the original decree and took the property from the innocent purchaser, and the Supreme Court sustaind the act of Congress which allowed this review and the decree which followed it. There can be no
43 doubt under these decisions that Congress had plenary power to authorize a review of the final judgments of the courts in the Indian Territory and of the Supreme Court in these citizenship cases. The contention that the act of 1902 is unconstitutional because it is class legislation is answered by the decision of the Supreme Court in the Stephen case which sustained the act of July 1, 1898, which was of the same character. The suggestion that the citizenship court was a commission and not a judicial tribunal is immaterial, because the power of the legislative department of the Government to authorize the review of the judgments of citizenship by a commission, a committee, or an agent was as complete as it was to authorize that review by a court. It had plenary authority to review the judgments itself or to create or select a tribunal to its

liking for the purpose. In view of the considerations and authorities to which reference has now been made, our conclusions are:

The power conferred upon the Dawes Commission and the United States Courts in the Indian Territory by the act of June 10, 1896, and upon the Supreme Court by the act of July 1, 1898, to determine who were citizens of the Choctaw and Chickasaw nations was legislative and not judicial and all judgments and proceedings thereunder were subject to any subsequent legislation of the United States respecting the question of citizenship, which was enacted before allotments of land were made to the successful litigants under the previous legislation.

Claimants of citizenship who secured judgments in their favor which were final under the acts of 1896 and 1898 when they were rendered and took possession of, and demanded suitable tracts of land as their allotments, before their judgments were made reviewable, acquired no vested rights therein against subsequent legislation enacted before the lands were allotted to them.

The judgments of citizenship rendered by the courts were conclusive upon the parties to them in the absence of subsequent legislation; but, though final when rendered, they were voidable and reviewable by subsequent acts of Congress passed before allotments of land were made under them.

The act of July 1, 1902, whereby a citizenship court was created and empowered to review the final judgments of the courts of the United States under the act of June 10, 1896, which had been affirmed by the Supreme Court under the act of July 1, 1898, was constitutional and impregnable to the attacks of the successful litigants who had not secured allotments of land before its passage.

Finally counsel for defendant insist that he is not bound by the decree of the citizenship court (1) because he was not one of the ten persons named as defendants therein, but as Congress had plenary power to directly reverse the judgments of citizenship or to determine in what way they should be reversed, its enactment that the ten persons should stand as the representatives of all others similarly situated was not ineffective; (2) because there was no proof in the citizenship court, and there is no finding in the decree that he was one of the persons similarly situated with the ten defendants named, but the decree avoids all the judgments of the courts in the Indian Territory whereby in cases appealed from the decisions of the Dawes Commission under the act of June 10, 1896, any of the defendants named or any of the persons similarly situated was adjudged a citizen of the Choctaw or Chickasaw nation and the answer of the defendant in this action that upon such an appeal he secured a judgment of one of those courts that he was a citizen of the Choctaw nation sufficiently discloses the fact that he was similarly situated with the ten defendants named in the decree of the citizenship court and brings him clearly within its terms; (3) because the act
44 of 1902 required that notice of the pendency in the citizenship court of the suit there brought and of the time for answering the bill should be published for four weeks in two newspapers generally circulating in the Choctaw and Chickasaw nations

thirty days before the time for answering the bill expired, and the decree does not recite or adjudge that this notice was published (32 Stat. 647), but the ten defendants are named in the title of the decree as defendants "for themselves and as representatives of all persons similarly situated, claiming to be members of the Choctaw and Chickasaw nations, by virtue of alleged decrees of the United States Court for the Central and Southern Districts of the Indian Territory sitting respectively at South McAlester and Ardmore, and commonly known as Court Claimants," the decree recites: "The court finds that due and legal notice of the pendency and prayer of this suit has been given to the defendants herein in conformity of law" and it adjudges that the judgments in favor of those similarly situated as well as the judgments in favor of the ten defendants named and in favor of other defendants who appeared be annulled.

Counsel concede that the recital in the decree that the notice had been given "in conformity of law" is sufficient in the absence of any inconsistent record or evidence to raise the presumption of the legal publication of the notice and of the jurisdiction of the court over the persons of all who are affected by the decree (Applegate *v.* Lexington &c. Min. Co., 117 U. S. 255, 269; Foster *v.* Givens, 14 C. C. A. 625, 632, 67 Fed. 684, 691; Beattie *v.* Wilkinson, 36 Fed. 646; Rumfelt *v.* O'Brien, 57 Mo. 569, 572; Harris *v.* Lester, 80 Ill. 307, 315; Mulvey *v.* Gibbons, 87 Ill. 367, 380; 17 Am. & Eng. Enc. of Law 1082) were it not for the fact that this recital is limited by the words "the defendants herein," but they insist that these words refer to the ten defendants whose names are written in the title of the decree and to them alone. Such a construction, however, is inconsistent with the decree against those similarly situated which could have been lawfully rendered only in case the publication of the notice had been made, and the words "the defendants herein" must therefore be given a broader interpretation and must include those who were similarly situated as well as those whose names were written in the title of the decree.

The defendant pleaded the decree of the citizenship court in his answer and took upon himself the burden of showing by adequate averments why it did not estop him from asserting that he was a citizen of the Choctaw nation. He alleged, it is true, that he was not similarly situated with the defendants named in that decree, but he failed to set forth any difference between his situation and that of the ten defendants there named, while his answer disclosed the fact that he had secured a like judgment upon a similar appeal. He alleged, it is true, that he was not a party to the suit in the citizenship court and that no notice was ever served upon him therein, but he failed to allege that the notice of the pendency of that action was not published in the manner directed by the act of Congress. These averments were insufficient to withdraw the defendant from the estoppel of the decree, and the judgments of the courts in the Indian Territory against him in the action now under consideration must be *affirmed*.

It is so ordered.

Filed February 21, 1906.

45 *(Judgment.)*

And on the twenty-first day of February, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1905.

WEDNESDAY, *February* 21, 1906.

No. 2313.

HUGH WALLACE, WILL WALLACE, VERGE McGOODWIN, CHARLES SHANNON, JOHN HUNT, JOHN PERKINS and B. C. HILL, Plaintiffs in Error,

vs.

MRS. ELLA ADAMS, for Herself and as Natural Guardian and Next Friend of HENRY McSWAIN and ROMA McSWAIN, Her Minor Children.

In Error to the United States Court of Appeals in the Indian Territory.

This cause came on to be heard on the transcript of the record from the United States Court of Appeals in the Indian Territory, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said United States Court of Appeals, and the judgment of the United States Court for the Southern District of Indian Territory, in this cause, be, and the same are each hereby, affirmed with costs; and that Mrs. Ella Adams, for herself and as natural Guardian and next friend of Henry McSwain and Roma McSwain, her minor children, have and recover against Hugh Wallace, Will Wallace, Verge McGoodwin, Charles Shannon, John Hunt, John Perkins and B. C. Hill the sum of twenty dollars for their costs herein and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the United States Court for the Southern District of the Indian Territory, with directions for proceedings therein according to law and justice.

February 21, 1906.

46 *(Petition for Writ of Error.)*

And on the ninth day of April, A. D. 1906, the petition for a writ of error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Eighth Circuit.

HUGH WALLACE ET AL., Plaintiffs in Error,
vs.
MRS. ELLA ADAMS, for Herself and as Natural Guardian and Next Friend of HENRY MCSWAIN and ROMA MCSWAIN, Her Minor Children, Defendants in Error.

Petition for Writ of Error.

Your petitioners, Hugh Wallace, Will Wallace, Virge Goodwin, Charles Shannon, John Hunt, John Perkins and B. C. Hill, Plaintiffs in Error, in the above entitled cause, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Eighth Circuit, and that a judgment has therein been rendered on the 21st day of February, 1906, affirming a judgment of the United States Court of Appeals for the Indian Territory, which in turn affirmed a judgment of the United States Court for the Southern District of the Indian Territory; and that the matter in controversy in said suit exceeds One Thousand Dollars, besides costs; and that the jurisdiction of none of the courts above mentioned, is or was dependent, in any wise, upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of the different States; and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case; and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioners would respectfully pray that a writ of error be
47 allowed them in the above entitled cause, directing the Clerk of the United States Circuit Court of appeals to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiffs in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

A. C. CRUCE,
Attorney for Plaintiffs in Error.

The foregoing petition is granted and writ of error allowed, as prayed for, upon the plaintiffs giving bond according to law, in the sum of $1000.00.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

Mar. 27th, 1906.

(Endorsed:) # 2313. Hugh Wallace *et al.*, Plaintiffs in Error, *vs.* Mrs. Ella Adams *et al.* Petition for Writ of Error. Filed Apr. 9, 1906, John D. Jordan, Clerk.

(Assignment of Errors.)

And on the ninth day of April, A. D. 1906, an assignment of errors was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

HUGH WALLACE ET AL., Plaintiffs in Error,
vs.
MRS. ELLA ADAMS, for Herself and as Natural Guardian and Next Friend of HENRY MCSWAIN and ROMA MCSWAIN, Her Minor Children, Defendants in Error.

Assignment of Errors.

And now come the Plaintiffs in Error, Hugh Wallace, Will
48 Wallace, Virge Goodwin, Charles Shannon, John Hunt, John Perkins and B. C. Hill, by their attorney, A. C. Cruce, and say that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Eighth Circuit in the above entitled cause, and in the rendition of the final judgment therein, manifest error hath intervened, to the injury of said Plaintiffs in Error in this, to-wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the United States Court of Appeals for the Indian Territory, and the judgment of the United States Court for the Southern District of the Indian Territory, for the tract of land containing two hundred and seventy acres, described upon the record in said cause, and cost of suit, entered on the 21st day of February, 1906, in favor of said Defendants in Error and against said Plaintiffs in Error.

Second. Said Circuit Court of Appeals erred in not reversing the said judgment of the United States Court of Appeals for the Indian Territory, and of the United States Court for the Southern District of the Indian Territory, and in not remanding said cause to the said United States Court for the Southern District of the Indian Territory.

Third. The said Circuit Court of Appeals erred in not sustaining the first assignment of error upon the record in said cause.

Fourth. The said Circuit Court of Appeals erred in not sustaining the second assignment of error upon the record in said cause.

Fifth. The said Circuit Court of Appeals erred in not sustaining the third assignment of error, upon the record in said cause.

Sixth. The said Circuit Court of Appeals erred in not sustaining the fourth assignment of error upon the record in said cause.

Seventh. Said Circuit Court of Appeals erred in not sustaining the fifth assignment of error upon the record in said cause.

Eighth. The said Circuit Court of Appeals erred in holding
49 that the power conferred upon said United States Courts in the Indian Territory by the Act of June 10, 1896, and upon the Supreme Court of the United States by the Act of July 1, 1898, was legislative and not judicial, and that all judgments and proceedings of said courts were subject to be set aside by subsequent legislation.

Ninth. Said Circuit Court of Appeals erred in holding that the judgments declaring parties to be entitled to Indian citizenship, under the Act of June 10, 1896, and which were affirmed by the Supreme Court, under the Act of July 1, 1898, were not the result of the exercise of judicial power, and that said legislative department "Had the same power at any time before allotments were made, and the rights of allottees became vested, to disregard, or to authorize, a review of the decisions of those courts, by other tribunals, that it would have had to have disregarded or reviewed the decisions of an Indian Agent, a Commission, or a Committee, if it had conferred this power upon them."

Tenth. The said Circuit Court of Appeals erred in holding that the Plaintiff in Error, Hill, who took possession of, and erected valuable improvements upon, the land in controversy in this action, by virtue of a judgment of the United States Court for the Southern District of the Indian Territory declaring him to be a member of the Choctaw Tribe of Indians (which judgment was affirmed by the Supreme Court of the United States), took no vested interest in the lands in controversy, and that Congress had the right thereafter to authorize any subordinate tribunal to set aside the judgments of said courts, and to deprive the plaintiff in error of said land, without compensation.

Eleventh. Said Circuit Court of Appeals erred in failing to hold that the two questions which were submitted to the determination of the Choctaw and Chickasaw Citizenship Court, by the Act of July 1, 1902, had already been determined by the judgment of the Supreme Court in the case of Stephens *vs.* Cherokee Nation, 174 U. S. 445, and had thus become *res judicata*.

Twelfth. Said Circuit Court of Appeals erred in holding
50 that "Claimants of citizenship, who secured judgment in their favor, which were final under the Acts of 1896 and 1898, when they were rendered, and took possession of and demanded suitable tracts of land as their allotments before their judgments were made reviewable, acquired no vested rights therein against subsequent legislation enacted before allotments were made to them."

Thirteenth. The said Circuit Court of Appeals erred in holding that "The Act of July 1, 1902, whereby a citizenship court was created and empowered to review the final judgments of the courts of the United States, under the Act of June 10, 1896, which had been affirmed by the Supreme Court under the Act of July 1, 1898, was constitutional and impregnable to the attacks of the successful litigants who had not secured allotments of land before its passage."

Wherefore the said plaintiffs in Error, Hugh Wallace, Will Wallace, Virge Goodwin, Charles Shannon, John Hunt, John Perkins and B. C. Hill, pray that for the errors aforesaid, and other errors appearing in the record of the United States Circuit Court of Appeals in the above entitled cause, to the prejudice of the plaintiffs in error, the said judgment of said United States Circuit Court of Appeals be reversed, annulled and for naught esteemed, and that said cause be remanded to the United States Court for the Southern District of the Indian Territory, with instructions to grant a new trial in said cause, or for such further proceedings in said cause as may be determined upon by this Honorable Court, to the end that justice may be done in the premises.

A. C. CRUCE,
Attorney for Plaintiffs in Error.

(Endorsed:) # 2313. Hugh Wallace, *et al.*, Plaintiffs in Error, *vs.* Mrs. Ella Adams, *et al.* Assignment of Errors. Filed Apr. 9, 1906, John D. Jordan, Clerk.

(*Bond on Writ of Error.*)

And on the ninth day of April, A. D. 1906, a bond on writ of error was filed in said cause, in the words and figures follow-
51 ing, to-wit:

Know all men by these presents, That we, Hugh Wallace, Will Wallace, Verge McGoodwin, Charles Shannon, John Hunt, John Perkins and B. C. Hill, as principal-, and —— —— as sureties, are held and firmly bound unto Mrs. Ella Adams for herself and as natural guardian and next friend of Henry McSwain and Roma McSwain, her minor children, in the full and just sum of one thousand (1,000) dollars, to be paid to the said Mrs. Ella Adams for herself and as such natural guardian and next friend aforesaid, her certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of ——, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a United States Circuit Court of Appeals for the Eight Circuit in a suit depending in said Court, between Hugh Wallace, Will Wallace, Verge Goodwin, Charles Shannon, John Hunt, John Perkins and B. C. Hill, plaintiffs in error, and Mrs. Ella Adams, for herself and as natural guardian and next friend of Henry McSwain and Roma McSwain, her minor children, defendant in error, a judgment was rendered against the said plaintiffs in error and the said plaintiffs in error having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant in error citing and admonishing her to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said plaintiffs in error shall prosecute said writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

HUGH WALLACE,
WILL WALLACE,
VERGE GOODWIN,
CHAS. SHANNON,
JOHN HUNT,
JOHN PERKINS, AND
B. C. HILL, [SEAL.]
52 LEE CRUCE,
G. W. STUART. [SEAL.]

Sealed and delivered in presence of—
——— ———.

Approved by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

I am personally acquainted with the sureties to the within supersedeas bond, and I certify that their financial condition is such as amply to secure the conditions of the bond.

HOSEA TOWNSEND,
U. S. Judge Southern District Indian Territory.

(Endorsed:) No. 2313. Hugh Wallace, *et al.*, Plaintiffs in Error, *vs.* Mrs. Ella Adams, *et al.* Bond on Writ of Error. Filed Apr. 9, 1906. John D. Jordan, Clerk.

(*Writ of Error.*)

And on the ninth day of April, A. D. 1906, a writ of error was filed in said cause, the original of which, with the Clerk's return endorsed thereon, is hereto attached and herewith returned:

53 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between Hugh Wallace, Will Wallace, Verge Goodwin, Charles Shannon, John Hunt, John Perkins, and B. C. Hill, plaintiffs in error, and Mrs. Ella Adams, for herself and as natural guardian and next friend of Henry McSwain and Roma

McSwain, her minor children, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 3d day of April, in the year of our Lord one thousand nine hundred and six.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

54 [Endorsed:] No. 2313. Hugh Wallace, *et al.*, Plaintiffs in Error, *vs.* Mrs. Ella Adams, *et al.* Writ of Error. Filed Apr. 9, 1906. John D. Jordan, Clerk.

Return to Writ.

UNITED STATES OF AMERICA, *Eighth Circuit, ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name, and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fourteenth day of April, A. D. 1906.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

55 *(Citation.)*

And on the ninth day of April, A. D. 1906, a citation was filed in said cause, the original of which, with the proof of service endorsed thereon, is hereto attached and herewith returned:

56 UNITED STATES OF AMERICA, *ss:*

To Mrs. Ella Adams, for herself and as natural guardian and next friend of Henry McSwain and Roma McSwain, her minor children, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Eighth Circuit wherein Hugh Wallace, Will Wallace, Verge Goodwin, Charles Shannon, John Hunt, John Perkins, and B. C. Hill are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, Associate Justice of the Supreme Court of the United States, this third day of April, in the year of our Lord one thousand nine hundred and six.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

57 On this 6th day of April, in the year of our Lord one thousand nine hundred and six, personally appeared before me, the subscriber, S. H. Butler, and makes oath that he delivered a true copy of the within citation to H. H. Brown, Attorney of Record for Mrs. Ella Adams, for herself and as natural guardian and next friend of Henry McSwain and Roma McSwain, her minor children.

S. H. BUTLER.

Sworn to and subscribed the 6th day of April, A. D. 1906.

[Seal Notary Public, Southern District, Indian Territory.]

ROBUTA NIBLACK,
Notary Public.

[Endorsed:] No. 2313. Hugh Wallace, *et al.*, Plaintiffs in Error, vs. Mrs. Ella Adams, *et al.* Citation. Filed Apr. 9, 1906. John D. Jordan, Clerk.

58 *(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing sixty-two pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said Circuit Court of Appeals, in a certain cause in said Court wherein Hugh Wallace, *et al.,* were Plaintiffs in Error, and Mrs. Ella Adams, for herself and as natural guardian and next friend of Henry McSwain and Roma McSwain, her minor children, were Defendants in Error, No. 2313, December Term, 1905, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original writ of error, with the Clerk's return thereto, and the original citation, with the proof of service endorsed thereon, are hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at office in the City of St. Louis, Missouri, in the Eighth Circuit, this fourteenth day of April, A. D. 1906.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 20,205. U. S. circuit court of appeals, 8th circuit. Term No. 260. Hugh Wallace, Will Wallace, Verge Goodwin *et al.,* plaintiffs in error, *vs.* Mrs. Ella Adams, for herself and as natural guardian and next friend of Henry McSwain and Roma McSwain, her minor children. Filed April 20th, 1906. File No. 20,205.

FILE COPY.

Office Supreme Court,
FILED.
DEC 8 190
JAMES H. McKEN

Supreme Court of the United States

OCTOBER TERM 1906

NO. 260

HUGH WALLACE, WILL WALLACE, VERGE GOODWIN, ET. AL., Plaintiffs in Error,

vs.

MRS. ELLA ADAMS, FOR HERSELF AND AS NATURAL GUARDIAN AND NEXT FRIEND OF HENRY McSWAIN AND ROMA McSWAIN, HER MINOR CHILDREN,

Defendants in Error.

Brief for Plaintiffs in Error.

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Supreme Court of the United States

OCTOBER TERM 1906

NO. 260

HUGH WALLACE, WILL WALLACE, VERGE GOODWIN, ET. AL., Plaintiffs in Error,

vs.

MRS. ELLA ADAMS, FOR HERSELF AND AS NATURAL GUARDIAN AND NEXT FRIEND OF HENRY McSWAIN AND ROMA McSWAIN, HER MINOR CHILDREN,

Defendants in Error.

STATEMENT

There are two controlling questions in this case:

First: The nature and effect of certain decrees of the United States Courts for the Southern and Central Districts of the Indian Territory, admitting parties to membership in the Choctaw and Chickasaw Tribes of Indians under the act of June 10, 1896, which decrees were subse-

quently affirmed by the Supreme Court, under the Act of July 1, 1898.

Second: The constitutionality of the Act of July 1, 1902, creating the "Choctaw and Chickasaw Citizenship Court," and the validity of the decree of that court, rendered on the 17th day of December, 1902, purporting to vacate the former decrees.

It is deemed profitable, therefore, to refer, first, to the various acts of Congress, as well as to the reports of the Dawes Commission, that effect the question of citizenship in the Choctaw and Chickasaw Tribes.

On the 30th day of March, 1893 (27 Stat. 612, 645) Congress authorized the appointment of three commissioners to negotiate with the Five Civilized Tribes, "for the purpose of extinguishing the tribal title to their land, either by cession to the United States or by allotment in severalty among the members of such tribes." By the Act of March 2, 1895, (28 Stat. 939) two additional members were added to this Commission.

On March 29, 1894, the senate authorized its "Committee on the Five Civilized Tribes of Indians" to inquire into the condition of affairs in the Indian Territory, and report back to Congress, recommending such legislation as was desirable.

"The report of this committee, made May 7, 1894, called attention to the unsatisfactory state of affairs in the Indian Territory; stated that the lands were held by the Tribes in trust, for the benefit of their respective mebmers; that this trust was not being properly executed; that there was cause of complaint among the Indians as to the character of their own courts, and recommended that Congress address itself to the difficult task of settling the unsatisfactory conditions there existing. On November 20, 1894 and November 18, 1895 the Dawes Commisson made elaborate reports upon conditions in the Indian country. The Indian Governments were referred to in this language:

> "The commision is compelled by the evidence forced upon them during their examination into the administration of the so-called governments in this Territory, to report that these governments, in all their branchas, are wholly corrupt, irresponsible and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect."

Attenton was called to the fact that influential members of the tribes were holding large bodies of the public domain, and that the membership rolls of the tribes were being arbitrarily manipulated to the prejudice of the weaker members. The Commission declared:

"That if citizenship is left without control or supervision, to the absolute determination of the tribal authorities with power to decitizenize at will, the greatest injustice will be perpetrated, and many good and law abiding citizens reduced to beggary."

In response to this bitter arraignment of the Indian governments, Congress, in the Indian Appropriation Bill of June 10, 1896, enacted the following:

"That said commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled; Provided, however, that such application shall be made to such commissioners within three months after the passage of this act.

"The said commission shall decide all such applications within ninety days after the same shall be made.

"That in determining all such applications, said commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes and shall give due force and effect to the *rolls*, usages and customs of *each* of said nations or tribes: And provided further, that the rolls of citizenship of the *several* tribes as now existing

are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of *either* of said tribes, and whose right thereto has either been denied *or not acted upon,* or any citizen who may within three months from and after the passage of this act, desire such citizenship, may apply to the legally constituted court or committee designated by the *several* tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

"In the performance of such duties, said commission shall have power and authority to administer oaths, to issue process for and compel attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now reside beyond the limits of said territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said *several* tribes, Provided, that if the *tribe* or any person be aggrieved with the decision of the tribal authorities or the commission provided for in this act, *it* or he may appeal from such decision to the United States District

Court, provided, however, that the appeal shall be taken within sixty days, and the judgment of the court shall be final.

"That the said commission, after the expiration of six months, shall cause a complete roll of citizenship of *each* of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States Courts, as provided herein."

Preliminary to a discharge of the duty thus cast upon the Dawes Commission, that body on July 8, 1896, adopted the following rules to govern the hearing and determination of applications for citizenship in any one of the Five Tribes.

"Any person desiring that said commission pass upon his claim to citizenship, in any of said tribes under provisions of this act, must make application in writing, signed and sworn to, containing a particular statement of the grounds upon which his claim is based, and accompanied by such evidence, in the form of affidavits, deposition, or record evidence, as he may desire to have considered in support of his claim, all to be forwarded under seal to the Commission at Vinita, I. T., before the tenth day of September, 1896.

"The application should state facts sufficient, if true, to show that the applicant is entitled to citizenship. The applicant must, at the same time furnish the *chief* or *governor* of the *nation in which citizenship is sought,* a copy of such application, and evidence, and shall furnish to the Commission evidence of this fact. Such *chief* or *governor* must, within thirty days thereafter, furnish the Commission *his* answer thereto, signed and sworn to by some duly authorized officer of his government, and accompanied by such evidence in the form of affidavits, depositions or record evidence as he may desire the Commission to consider in support of his answer. All argument shall be in writing.

HENRY L. DAWES, Chairman
FRANK G. ARMSTRONG
ALS. McKENNON
T. B. CABANISS
A. B. MONTGOMERY
Commissioners.

On the 28th day of June, 1898, Congress enacted what is generally known as the Curtis Act. Section twenty-nine of this Act ratified the agreement made by the Dawes Commission with the Choctaw and Chickasaw tribes, April 23, 1897; as amended by that Act, and which was subsequently ratified by a majority vote of the Choctaw and Chickasaw citizens. This agreement,

ERRATTA.

On page 8 of the brief, at the end of the quotation designated Section 11, insert the following:

Section 29 of the foregoing Act provided

> "That all the lands within the Indian Territory belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes so as to give *to each member* of these tribes, so far as possible, a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands."

which had for its purpose the winding up of the tribal affairs of the Chickasaw and Choctaw nations, contained the following provisions:

> (Sec. 11) "That when the roll of citizenship of any one of said Nations or Tribes is fully completed, as provided by law, and a survey of the lands of said Nation or Tribe is also completed, the commission heretofore appointed under Acts of Congress, and known as the Dawes Commission, shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said Nation or Tribe susceptible of allotment, among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same. * * * * * * Provided further, that if the person to whom an allotment shall have been made shall be declared, upon appeal as herein provided for, by any of the Courts of the United States in or for the aforesaid Territory, to have been illegally accorded rights of citizenship, and for that or any other reason, declared not to be entitled to any allotment, he shall be ousted and ejected from said lands." (30 Stat. 495).

The same section provides:

> "That each member of the Choctaw and Chickasaw Tribes, including Choctaw and Chickasaw freedmen, shall, where it is possible, have the right

to take his allotment on land, the improvements on which belong to him, and such improvements shall not be estimated in the value of his allotment."

On July 1, 1898, Congress enacted the following provision:

"Appeals shall be allowed from the United States Courts in the Indian Territory direct to the Supreme Court of the United States to either party, in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory, under the rules and regulations governing appeals to said court in other cases; provided that appeals in cases decided prior to this act, must be perfected in one hundred and twenty days from its passage; and in cases decided subsequently thereto, within sixty days from final judgment; but in no such case shall the work of the commission to the Five Civilized Tribes be enjoined or suspended by any proceeding in, or order of, any court, or of any judge, until after final judgment in the Supreme Court of the United States. In cases of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible."

Thereupon numerous appeals were prosecuted to this court, and in the case of Stephens against the Cherokee

Nation, (174 U. S. 445) all the foregoing legislation was held to be constitutional.

The "Choctaw and Chickasaw Citizenship Court" was created and its jurisdiction defined by the following sections of the Act of July 1, 1902:

> Sec. 31—"It being claimed and insisted by the Choctaw and Chickasaw Nations that the United States Courts in the Indian Territory, acting under the Act of Congress approved June 10, 1896, have admitted persons to citizenship or to enrollment as such citizens in the Choctaw and Chickasaw Nations, respectively, without notice of the proceedings in such courts being given to each of said nations; and it being insisted by said nations that, in such proceedings, notice to each of said nations was indispensable, and it being claimed and insisted by said nations that the proceedings in the United States Courts in the Indian Territory, under the said act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commissian, and should not have extended to a trial *de novo* of the question of citizenship; and it being desirable to finally determine these questions, the two nations, jointly, or either of said nations acting separately and making the other a party defendant, may, within ninety days after this agreement becomes effective, by a bill of equity filed in

the Choctaw and Chickasaw Citizenship Court hereinafter named, seek the annulment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship or enrollment by said courts, with notice to one, but not to both of said nations, shall be made defendants to said suit as representatives of the entire class of persons similarly situated the number of such persons being too numerous to require all of them to be made individual parties to the suit; but any person so situated, may, upon his application, be made a party defendant to the suit. Notice of the institution of said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant, as aforesaid, and upon each of said ten representative defendants, and shall also be published for a period of four weeks in at least two weekly newspapers having general circulation in the Choctaw and Chickasaw Nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering the same, which shall not be less than thirty days after the last publication. Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizenship or enrollment by said United States Courts in the Indian Territory was wrongfully obtained as provided in the next section. In the event said citizenship judgments or decis-

ions are annulled or vacated in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers and proceedings in any citizenship case in which the judgment or decision is so annulled or vacated, shall, upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said Citizenship Court by the court having custody and control of such files, papers and proceedings, and upon the filing in such Citizenship Court of the files, papers and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification thereof has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed in said Citizenship Court, and such further proceedings shall be had therein in that court, as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein.

Sec. 32—"Said Citizenship Court shall also have appellate jurisdiction over all judgments of the courts in the Indian Territory rendered under said act of Congress of June tenth, eighteen hundred and ninety six, admitting persons to citizenship or to enrollment as citizens in either of said nations. The right of ap-

peal may be exercised by the said nations jointly, or by either of them acting separately, at any time within six months after this agreement is finally ratified. In the exercise of such appellate jurisdiction said Citizenship Court shall be authorized to consider, review and revise all such judgments, both as to findings of fact and conclusions of law, and may, wherever in its judgment substantial justice will thereby be subserved, permit either party to any such appeal to take and present such further evidence as may be necessary to enable said court to determine the very right of the controversy. And said court shall have power to make all needful rules and regulations prescribing the manner of taking and conducting said appeals and of taking additional evidence therein. Such Citizenship Court shall also have like appellate jurisdiction and authority over judgments rendered by such courts under the said act denying claims to citizenship or to enrollment as citizens in either of said nations. Such appeals shall be taken, within the time hereinbefore specified, and shall be taken, conducted and disposed of in the same manner as appeals by the said nations, save that notice of appeals by citizenship claimants shall be served upon the chief executive officer of both nations;

"*Provided, that paragraphs thirty one, thirty two and thirty three shall go into effect immediately after the passage of this act of Congress.*

Sec. 33—"A court is hereby created to be known

as the Choctaw and Chickasaw Citizenship Court, the existence of which shall terminate upon the final determination of the suits and proceedings named in the last two preceding sections, but in no event later than the thirty first day of December, nineteen hundred and three. Said court shall have all authority and power necessary to the hearing and determination of the suits and proceedings so committed to its jurisdiction, including the authority to issue and enforce all requisite writs, process and orders, and to prescribe rules and regulations for the transaction of its business. It shall also have all the powers of a circuit court of the United States in compelling the production of books, papers and documents, the attendance of witnesses and in punishing contempt. *Except where herein otherwise expressly provided the pleadings, practice and proceedings in said court shall conform as near as may be, to the pleadings, practice, and proceedings, in equity causes in the Circuit Court of the United States.* The testimony shall be taken in court or before one of the judges, so far as practicable. Each judge shall be authorized to grant, in vacation, or recess, interlocutory motions not affecting the substantial merits of the case. Said court shall have a chief judge and two associate judges, a clerk, a stenographer, who shall be deputy clerk, and a bailiff. * * * * * * The clerk of the United States Court in the Indian Territory, having custody and control of the files, papers

and proceedings in the original citizenship cases shall receive a fee of two dollars and fifty cents for transferring and certifying to the Citizenship Court the files, papers and proceedings in each case, without regard to the number of persons whose citizenship is involved therein, and said fee shall be paid by the person applying for such transfer and certification. The judgment of the Citizenship Court in any or all of the suits or proceedings so committed to its jurisdiction shall be final. All expenses necessary to the proper conduct, on behalf of the nations, of the suits and proceedings provided for in this and the two preceding sections shall be incurred under the direction of the executives of the two nations, and the Secretary of the Interior is hereby authorized, upon certificate of said executives, to pay such expenses as in his judgment are reasonable and necsssary out of any of the joint funds of said nations in the Treasury of the United States." (32 Stat. 641)

Acting under the authority sought to be conferred by this act, the Choctaw and Chickasaw Nations instituted a suit in the Citizenship Court, styled upon the docket thereof, "The Choctaw and Chickasaw Nations or Tribes of Indians vs. J. T. Riddle, et. al." On the 17th day of December, 1902, that court rendered its decree, wherein it held that in the proceedings in the Unised States Courts, wherein parties were admitted to citizenship, it was indispensable that both the Choctaw and Chickasaw

Tribes should be parties to such litigation, and that the proceedings of those courts should have been confined to a review of the testimony before the Dawes Commission. It was held that the alleged errors were sufficient to authorize the vacation of the decrees rendered by the United States Courts, and a decree was accordingly entered, that all such judgments "be set aside, annulled, vacated and held for naught." (R. 9-10) Hill was not a party to this suit, nor did he apply for a transfer to the Citizenship Court, of the action in which he had procured a decree admitting him to citizenship.

The Act of May 2, 1890, put in force in the Indian Territory the Constitution of the United States, "to have the same force and effect as elsewhere in the United States." (26 Stat. 81.)

By the Act of March 3, 1901, all Indians in the Indian Territory were made citizens of the United States. (31 Stat. 1447.)

Section 5033 Mansfield's Digest, of the Statutes of Arkansas, put in force in the Indian Territory provides that:

> "The defendant may set forth in his answer as many grounds of defense, counter-claim and set-off, whether legal or equitable, as he shall have."

Section 4929 provides:

> "Where the action has been properly commenced by proceedings at law, either party shall have the right, by motion, to have any issue which heretofore was exclusively cognizable in chancery tried in the manner hereinafter prescribed in cases of equitable proceedings, and if all the issues are such as heretofore were cognizable in chancery, though none were exclusively so, the defendant shall have the right to have them all tried as in cases of proceedings in equity."

The complaint and answer disclose the following state of facts: This is an action of ejectment, brought by Henry and Roma McSwain, who are minors, through their parent, Ella Adams, as next friend, to recover a tract of land in the Chickasaw Nation, Indian Territory. The plaintiffs based their right to recover upon the fact, that in September 1904, upon their application, the land was regularly allotted to them by the Dawes Commission. The plaintiffs were never in possession of the land, but the title thus declared upon is admitted to be sufficient to sustain the action, unless the answer of the defendants disclosed a superior right of possession. All the defendants, except Hill, disclaimed title, and justified their holding through him. Hill claimed right to the possesion by

virtue of a decree of the United States Court for the Southern District of the Indian Territory, rendered under the Act of June 10, 1896.

Hill is a Choctaw Indian by blood, but his right to membership in the Tribe was disputed by the tribal authorities, and accordingly, on the 10th day of August, 1896, he presented his application to the Dawes Commission to be enrolled as a citizen thereof. In this application, he complied in all things, with the foregoing rules promulgated by the Commission.

In November, 1896, his application was rejected by the Commission, and thereafter, in the same month, he appealed to the United States Court for the Southern District of the Indian Territory. His cause was regularly docketed, and referred to a Master, to take proof. On the 21st day of February, 1898, the Master made his report, and on the 8th day of March in the same year, the cause came on for final hearing, when the court entered a decree, declaring Hill to be a member of the Choctaw Tribe of Indians by blood, and entitled to "all the rights, privileges and immunities of other members of the Tribes."

After the rendition of this decree and in the same month, he took possession of the land in controversy,

claiming it as his allotment. He was still in possession at the date of the passage of the Curtis Act, June 28, 1898; and had, in the meantime erected permanent improvements thereon, consisting of fencing, houses, etc., of the value of not less than $1,000. Thereafter, the Choctaw Nation appealed to the Supreme Court, where the case was affirmed (Stephens vs. Cherokee Nation, *supra*). In the year 1898, (the exact date not appearing in the record) he exhibited to the Dawes Commission a copy of the decree of the United States Court admitting him to citizenship, and asked to be enrolled as a member of the Choctaw Tribe.

It does not appear that any action was taken by the Commission upon this application, until in the year 1904 when he was finally refused enrollment, the Commission assigning as a reason for its action, that the decree of the United States Court admitting him to citizenship, had been vacated by the decree of the Choctaw-Chickasaw Citizenship Court, entered in the case of the Choctaw and Chickasaw Nations vs. J. T. Riddle, *supra*.

During all this time, Hill had remained in possession of the land, claiming the same as his allottment, and in the meantime, had placed thereon other improvements, of the

value of $1,000. As has been stated, Hill was not a party to the suit before the Citizenship Court; was not served with notice of the proceedings had therein, nor was his case transferred to that court, under section 31 of the Act of July 1, 1902. The plaintiffs have never been in possession of the land, have never claimed to own any of the improvements thereon, but, upon the contrary, when they had the land allotted to themselves, they knew of Hill's possession, and claim to ownership, and made no effort to compensate him for the improvements he had placed thereon. Hill, in his answer, asked that the cause be transferred to the equity side of the docket, that plaintiff's allotment be canceled, that he be quieted in his title to the land, and for such other equitable relief as he was entitled to.

The plaintiffs demurred to this answer; the demurrer was sustained, and the defendants declining to plead further, judgment was rendered for the plaintiffs.

The defendant's contention was that the Act of July 1, 1902, which created the Citizenship Court, and authorized it to vacate the decrees of the United States Courts which had been affirmed by this court, was unconstitutional; that the decree of the Citizenship Court wherein it

sought to vacate the decrees of the United States Courts, admitting parties to citizenship, was of no effect; and that, consequently, the decree which the defendant Hill had procured, admitting him to citizenship in the Choctaw Tribe was still in full force and effect. The cause was taken to the Indian Territory Court of Appeals where on June 16, 1905, that court rendered the following opinion:

> "The main question presented by this appeal is one involving the constitutionality of sections 31, 32 and 33 of the Act of July 1, 1902."

The court here copies the three sections referred to, and thus concludes its opinion:

> "This court, after examination of the record, is of opinion Congress had the power to enact the provisions above set out and they are not in conflict with the Constitution of the United States, and the opinion of the Court below is, therefore affirmed."(R. 21-24).

The case was then taken to the United States Circuit Court of Appeals for the Eighth Circuit, where on the 21st day of February, 1906, it was again affirmed. (R. 31-43.)

The very able opinion of that court, rendered by Judge Sanborn, held that the question of membership in the

Indian Tribes was a political one, over which Congress had plenary power, and that the United States Courts in the Indian Territory, as well as the Supreme Court, were exercising *legislative* and not *judicial* power, in the determination of the same. The following excerpts from this opinion are interesting and present, in a nutshell, the grounds upon which it was based:

> "It (Congress) might have determined this issue itself, and have declared by direct enactment that the defendant, Hill, was a citizen of the Choctaw Nation. It might have empowered a committee, an Indian agent, a commission, a board or a court, to examine and determine that question on its behalf, and as the determination of this question of citizenship was a purely *legislative* and *administrative* function and not a *judicial* one, Congress necessarily had the authority under the Constitution at any time before an allottment of land under its previous acts had been finally made to the defendant, and his right to the land had thereby become vested, to repeal its previous legislation, to change its method of determining the issue, *to strike down any decision that had been made under its previous acts,* to prescribe a new method of deciding the question, or to refuse to determine it altogether and leave the claim of the defendant as it found it, conclusively barred by its rejection by the Choctaw Nation.

"* * * * * * The fact that the effect of the Act of July 1, 1902, has been to avoid final judgments of the United States Courts in the Indian Territory, which had been affirmed by the Supreme Court, has not been disregarded. In the rendition of those judgments, however, those courts were not exercising any of the judicial power of the United States conferred by the third article of the Constitution. They were not constitutional, but Legislative Courts of the United States, exercising a jurisdiction conferred upon them by Congress by virtue of the sovereignty of the nation and of section 3 of article 4 of the Constitution, which empowers Congress to dispose of, and make all needful rules and regulations respecting the territory belonging to the United States. * * * * * *

"Now as the power conferred upon the courts in the Indian Territory and upon the Supreme Court respecting the decision of the question, who were citizens of the Indan Tribes, was purely *legislative* and *administrative* and the entire question still remained subject to congressional action, the legislative department had the same power, at any time before allottments were made and the rights of allottees became vested, to disregard, or to authorize a review of the decisions of these courts by other tribunals, that it would have had to have disregarded or reviewed the decisions of an Indian agent, a commission, or a committee, if it had conferred this power upon them. * * * * * * * * *

"The suggestion that the Citizenship Court was a commission and not a judicial tribunal is immaterial, because the power of the legislative department of the Government to authorize the review of the judgments of citizenship by a committee, a commission, or an agent was as complete as it was to authorize that review by a court. *It had plenary authority to review the judgments itself or to create or select a tribunal to its liking for the purpose.* * * * * * * * The power conferred upon the Dawes Commission and the United States Courts in the Indian Territory by the Act of June 10, 1896, and upon the Supreme Court by the Act of July 1, 1898, to determine who were citizens of the Choctaw and Chickasaw nations, was *legislative* and not *judicial* and all judgments and proceedings thereunder were subject to any subsequent legislation of the United States respecting the question of citizenship, which was enacted before allotments of land were made to the successful litigants under the previous legislation."

ASSIGNMENT OF ERRORS

The following is the assignment of errors filed in the United States Circuit Court of Appeals:

"First—Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the

United States Court of Appeals for the Indian Territory, and the judgment of the United States Court for the Southern District of the Indian Territory, for the tract of land containing two hundred and seventy acres, described upon the record in said cause, and cost of suit, entered on the 21st day of February, 1906, in favor of said defendants in error and against said plaintiffs in error.

"Second—Said Circuit Court of Appeals erred in not reversing the said judgment of the United States Court of Appeals for the Indian Territory, and of the United States Court for the Southern District of the Indian Territory, and in not remanding said cause to the said United States Court for the Southern District of the Indian Territory.

"Third—The said Circuit Court of Appeals erred in not sustaining the first assignment of error upon the record in said cause.

"Fourth—The said Circuit Court of Appeals erred in not sustaining the Second Assignment of error upon the record in said cause.

"Fifth—The said Circuit Court of Appeals erred in not sustaining the third assignment of error, upon the record in said cause.

"Sixth—The said Circuit Court of Appeals erred in not sustaining the Fourth Assignment of Error upon the record in said cause.

"Seventh—Said Circuit Court of Appeals erred in not sustaining the fifth assignment of error upon the record in said cause.

"Eighth—The said Circuit Court of Appeals erred in holding that the power conferred upon said United States Courts in the Indian Territory by the Act of June 10, 1896, and upon the Supreme Court of the United States, by the Act of July 1, 1898, was legislative and not judicial, and that all judgments and proceedings of said courts were subject to be set aside by subsequent legislation.

"Ninth—Said Circuit Court of Appeals erred in holding that the judgments declaring parties to be entitled to Indian citizenship, under the Act of June 10, 1896, and which were affirmed by the Supreme Court, under the Act of July 1, 1898, were not the result of the exercise of judicial power, and that said legislative department 'had the same power at any time before allotments were made, and the rights of allottees became vested, to disregard or to authorize a review of the decisions of those courts, by other tribunals, that it would have had to have disregarded or reviewed the decisions of an Indian Agent, a Commission, or a Committee, if it had conferred this power upon them.'

"Tenth—The said Circuit Court of Appeals erred in holding that the plaintiff in error, Hill, who took possession of, and erected valuable improvements upon the land in controversy in this action, by virtue of a judgment of the United States Court for the Southern District of the Indian Territory, declaring him to be a member of the Choctaw Tribe of Indians, (which judgment was affirmed by the Supreme Court

of the United States), took no vested interest in the lands in controversy, and that Congress had the right thereafter to authorize any subordinate tribunal to set aside the judgments of said courts, and to deprive the plaintiff in error of said land, without compensation.

"Eleventh—Said Circuit Court of Appeals erred in failing to hold that the two questions which were submitted to the determination of the Choctaw and Chickasaw Citizenship Court, by the Act of July 1, 1902, had already been determined by the judgment of the Supreme Court in the case of Stephens vs. Cherokee Nation, 174 U. S. 445, and had thus become *res judicata*.

"Twelfth—Said Circuit Court of Appeals erred in holding that 'Claimants of citizenship, who secured judgment in their favor, which were final under the Acts of 1896 and 1898, when they were rendered and took possession of and demanded suitable tracts of land as their allotments before their judgments were made reviewable, acquired no vested rights therein against subsequent legislation enacted before allotments were made to them.'

"Thirteenth—The said Circuit Court of Appeals erred in holding that 'The act of July 1, 1902, whereby a Citizenship Court was created and empowered to review the final judgments of the courts of the United States, under the Act of June 10, 1896, which had been affirmed by the Supreme Court under the Act of July 1, 1898, was constitutional and

impregnable to the attacks of the successful litigants who had not secured allotments of land before its passage."

ARGUMENT

The assignment of errors presents but one question. If the decree of the Choctaw-Chickasaw Citizenship Court in the test case known as the Riddle case, vacated the decree that defendant, Hill, had therefore procured in the United States Court for the Southern District of the Indian Territory, wherein he was adjudged to be a member of the Choctaw Tribe of Indians, this case should be affirmed. If it did not, it should be reversed. We believe the decree, establishing defendant's citizenship, was in no wise affected by the so-called decree of the Citizenship Court, and shall now state, as briefly as we can, the different reasons that lead to this conclusion.

FIRST

We contend that the Citizenship Court was not a *Court*, but a *Commission*; that it was but an arm of the administrative branch of the government; that it could not exercise judicial functions, and therefore could not vacate a decree entered by the regularly established courts. It

is true that the Circuit Court of Appeals declined to determine whether the Citizenship Court was a *Commission* or a *Court*. It is clear, however that the reasoning of that court would logically have led it to the conclusion that the Citizenship Court was not a judicial tribunal, if the learned judge who rendered the opinion had felt called upon to decide that question. That court, having decided that the United States Courts in the Indian Territory and the Supreme Court, in determining questions of Indian citizenship were, themselves, not acting as courts, but practically as commissions, it must inevitably follow, if this conclusion is correct, that the Citizenship Court, in exercising the jurisdiction conferred upon it, was likewise performing legislative and not judicial functions.

We shall undertake, hereafter in this brief, to show that the courts in the Indian Territory and the Supreme Court, *were* exercising judicial powers. Assuming therefore for the present, that the decree admitting Hill to citizenship was the result of the exercise of judicial power, let us examine the nature, jurisdiction and power of the Citizenship Court, to determine whether or not *it* was capable of exercising such judicial functions, as to authorize it to vacate this decree.

It would seem that the opinion of this court in *Ex Parte* Joines (191 U. S. 93) is a sufficient answer to this question.

Joines, so far as his Indian citizenship was concerned, was in a situation exactly similar to that of Hill in this case. He had been admitted to Chickasaw citizenship by the United States Court for the Southern District of the Indian Territory, his case had been appealed by the the Chickasaw Nation, to the Supreme Court and affirmed. In the Riddle case, *supra*, the Citizenship Court had undertaken to vacate the decree admitting him to citizenship. Thereafter, a petition was filed in this court, asking for a writ to prohibit the Citizenship Court from giving any further effect to its decree, or from certifying the same to the Dawes Commission. A rule was issued, requiring the members of the Citizenship Court to show cause why the writ of prohibition should not issue. In their response to this, the members of the that Court said:

> "There is nothing in the judgment of said Citizenship Court, in the test case, known as the Riddle case, nor did or does, the law in that behalf authorize said court to include or place in said judgment anything, by any *command* or *order* of said Citizenship Court, to *affect* or *control* the *acts*, or

any *act*, or *conduct* of the Commission to the Five Civilized Tribes, and therefore when the judgment was certified by said Citizenship Court, as a matter of *advice* merely, and not of *command*, to the Commission to the Five Civilized Tribes, the whole matter had passed beyond the jurisdiction and control of the Citizenship Court, so far as the said test case was and is concerned, as nothing further remained to be done in respect thereto by said Citizenship Court, as not even an execution for costs could be issued, the officers of said court being prohibited from charging or collecting any costs, and the marshal's fees and those of witnesses were, and are, to be paid by the respective parties, and in advance; and furthermore no provision exists, or was made by the act creating the court for the issuance of any execution for costs."

The Choctaw and Chickasaw Nations, through their attorneys, Mansfield, McMurray & Cornish, filed what was called a "reply" to the petition, in which they say:

"Said Choctaw and Chickasaw Citizenship Court is not a part of the established judicial system of the United States of America, over which this honorable court has jurisdiction, but that said court is a special legislative tribunal established by the Act of Congress, referred to in said petition, for the purpose of overcoming the difficulties in the administration of the affairs of the Choctaw and Chickasaw

> Nations, or Tribes of Indians, encountered by the executive department of the government of the United States, in carrying out the general policy of the government of the United States, to cause the lands of said Indians to be allotted among them in severalty, and to ultimately create a state of the Union out of the area embraced within the lands of the Five Civilized Tribes; and that such action is *political* and *executive* in its nature and not the proper subject of *judicial inquiry* or interference."

In their brief, these gentlemen use the following language.

> "We respectfully urge that the Choctaw and Chickasaw Citizenship Court is a special legislative tribunal, which should be considered as a part of the executive department of the government, engaged in carrying out the Indian policy of the United States and that, as such, its duties should be considered *political* in their nature and not the proper subject of judicial inquiry."

The Solicitor General, Henry M. Hoyt, filed a brief on behalf of the United States, in which he says:

> "The Choctaw and Chickasaw Citizenship Court, *like the Dawes Commission,* is a *political agency,* created by Congress in furtherance of the plan outlined in the Act of March 3, 1893, to-wit, the extinguishment of the National and Tribal title to lands within the Indian Territory."

It is clear, from these statements, that the issue as to whether the Citizenship Court was a commission or a court was, in this case, clearly made. The petitioner claimed that, unless prohibited, the Citizenship Court would gtve still further effect to its decree, and prohibit, if necessary, the Dawes Commission from enrolling him as a member of the Chickasaw Tribe of Indians.

The members of the Citizenship Court contended that that body had exhausted its jnrisdiction. That it had no power to compel the Dawes Commission to obey its decree; that it had certified its decree to that Commission, not as a *command*, but as a matter of *advice*, only. The substance of this answer was clearly this: that the Citizenship Court, in determining the two questions submitted to it, had acted only in an advisory capacity; that it had no authority to enforce its decree; and that the Dawes Commission was free either to accept this advise or to reject it. Is it not clear that this court agreed with the contentions of the respodents in that case? It is true that this court did not, in direct language, say that the Citizenship Court was incapable of exercising judicial power. It *did* hold, however, that the Citizenship Court had exhausted its jurisdiction, and that there was, therefore, nothing that

this court could prohibit. This is the language of the Court.

> "We need not consider whether the Citizenship Court is a court in such a sense as to be subject to prohibition. See *re vidal*, 179 U. S. 126, 45 L. ed. 118, 21 Sup. Ct. Rep. 48; Gordon vs. United States, 2 Wall. 561, 17 L. ed. 921, 117 U. S. 697 702. However, these things may be, it is clear that the writ will not issue after the cause is ended, and that the cause in the Citizenship Court was ended, before the present application was heard. *It is stated correctly by the answer that the act does not empower the Citizenship Court to do anything in the test case beyond rendering its judgment and certifying the same as it has done.*"

We submit that the net result of this court's holding in the Joines case is, that the Citizenship Court had no power to enforce its decree at the hands of the Commission, that its decree was purely *advisory*, and that the Commission could act upon this advice in such manner as its own judgment might dictate.

It is perhaps permissible just here to call specefic attention to the case of Gordon vs. United States, cited by Justice Holmes in the Joines case.

In 1863, Congress passed an act, amending the act establishing the court of claims. It was provided that in any cause wherein judgment was rendered in the Court of Claims, where the amount in controversy exceeded three thousand dollars, an appeal might be taken to the Supreme Court. Provision was made, that, when judgment for any amount was affirmed by the Supreme Court, a copy of the judgment should be certified by the clerk of the court of claims, signed by the Chief Justice, and presented to the Secretary of the Treasury, and thereupon paid out of any general appropriation made for the payment of claims. Section 14 of the act provided that no money should be paid out of the Treasury upon such judgments, until an appropriation therefor should be estimated for by the Secretary of the Treasury. Upon an appeal from the court of claims to the Supreme Court, Chief Justice Taney says:

> "Neither the court of claims, nor the Supreme Court, can do anything more than certify their opinion to the Secretary of the Treasury, and it depends upon him, in the first place, to decide whether he will include it in his estimate of private claims; and if he should decide in favor of the claimant, it will then rest with Congress to determine whether they will or will not make an appropriation for its payment.

> Neither court can, by any process, enforce its judgments, and whether it is paid or not, does not depend on the decision of said court, but upon the future action of the Secretary of the Treasury and of Congress."

The court holds that the court of claims might be properly required in the first instance to pass upon the validity of claims against the United States.

> "In this respect, the authority of the court of claims is like to that of an Auditor or Comptroller, with this difference only; that in the latter case the appropriation is made in advance, upon estimates furnished by the different executive departments, of their probable expense during the incoming year; and the validity of the claim is decided by the officer appointed by law for that purpose, and the money paid out of the appropriation afterwards made. In the case before us the validity of the claim is to be first decided, and the appropriation made afterwards. But in principle there is no difference between these two special jurisdictions created by Acts of Congress for special purposes, and neither of them possesses judicial power in the sense in which those words are used in the Constitution. The circumstance that one is called a court and its decisions called judgments cannot alter its character nor enlarge its power."

After discussing the equality of the three departments of government, and the absolute independence of the judicial department, the learned Judge proceeds:

"The appellate power and jurisdiction are subject to such exceptions and regulations as the Congress shall make. But the appeal is given, only from such inferior courts as Congress may ordain and establish to carry into effect the judicial power specifically granted to the United States. The inferior court therefore, from which the appeal is taken, must be a judicial tribunal, authorized to render a judgment which will bind the rights of the parties litigating before it, unless appealed from, and upon which the *appropriate process of execution may be issued by the court to carry it into effect.* And Congress cannot extend the appellate power of this court beyond the limits prescribed by the Constitution, and can neither confer nor impose upon it the authority or duty of hearing and determining an appeal from a Commissioner or Auditor ,or any other tribunal exercising only special powers under an Act of Congress, nor can Congress authorize or require this court to express its opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect. The award of execution is a *part* and an essential part of every judgment passed by a court exercising judicial power. *It is no judgment, in the legal sense of the term, without it.* Without such an award, the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be

merely an opinion, which would remain a dead letter, without any operation upon the rights of the parties unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect."

SECOND.

If it should be conceded that the Citizenship Court was a judicial body, then, its decree, wherein it sought to set aside the decrees admitting parties to citizenship, is insufficient to accomplish that purpose as to any other than the ten defendants in that case. Hill's answer shows that he was not a party to that suit, and that no testimony was introduced to show that he was situated similarly to the ten defendants therein named. The plaintiff's demurred admitted this allegation to be true. Was the decree, therefore, of the Citizenship Court sufficient to vacate the decree of Hill, which admitted him to citizenship?

The Act of Congress, authorizing this test suit, provided, that ten parties who had procured decrees, with notice to one, but not to both of the tribes, should be made defendants, as representative of all parties *similarly*

situated. It does not provide, however, for any defendants who were representative of parties who had tried their cases *de novo* in the Territorial courts. It might well be that parties having favorable decrees, had served both Governors with notice of the proceedings, so as to meet all objections that were urged on account of lack of notice to both tribes, but that their cases were tried *de novo.* There was no provision in the bill for any one to represent this class of people. No testimony being introduced in the Riddle case, to show that this defendant was situated similarly to the defendants therein, this court cannot, nor could the trial court, presume that they were so situated. ***A judgment that does not identify the party sought to be affected thereby is a nullity.*** The judgment in the Riddle case does not in express terms, attempt to set aside the judgment of defendant, Hill. If he had been situated similarly to the defendants in that suit, it was a matter easily ascertained, and it was the duty of the Citizenship Court to determine that question, *upon the proof.* Conceding now, for the sake of argument, that the Citizenship Court was a judicial tribunal, the question, whether the defendant Hill was situated similarly to the ten defendants, was a ques-

tion of fact, to be judicially found by that court. No other tribunal could inquire into that matter. The Citizenship Court could not *assume* this to be a fact. This question was as much submitted to the determination of that body as any other question. The act of Congress did not undertake to determine how many of the court claimants were affected by the two supposed irregularities. That matter was remitted to the determination of the Citizenship Court. No effort was made to bring the defendant into that court by service of process, though he was within its jurisdiction. It must, therefore, be true that the decree as to him is void.

> "To constitute a valid judgment, the record of it must contain sufficient certainty and precision to enable the clerk to issue an execution by inspection of the entry, without reference to other entries." (Captain of Steamer, Mollie Hamilton. 9th Heisk 203).

The judgment therein failed to disclose the name of the party affected, and was accordingly held void.

Black, on judgments, volume 1, section 116, states:

> "That a judgment will be sufficient if the name of the party to be affected thereby can be ascertained from other parts of the record."

If this cannot be done, however, he holds that the

judgment is void. And why should not this be the law? If A, whose name appears nowhere in the record, is to be affected by a judgment therein rendered, why may not B and C and D, be likewise affected? The very purpose of a decree is to settle, within itself, the rights of parties, and in the very nature of things, it must designate the parties to be affected thereby. We submit, that there is nothing in the decree in the Riddle case, that can affect the rights of any party, except the ten parties therein defendants. No living man can tell from that decree, whether there was any other party similarly situated. It may well be, that no other court claimant was situated similarly to the ten defendants in that case, or upon the contrary, it might be that *all* the members of the Choctaw and Chickasaw Nations were similarly situated. The ascertainment of that matter was a question of fact that could be determined by no tribunal other than the Citizenship Court. A judgment, being a matter of record, is notice to all the world, as to the rights of parties affected thereby. There must be, within the different parts of the record, sufficient identification of the parties whose rights are thereby affected, to enable a third party to judge, from an inspection of the record,

who are the parties to the controversy. Conceding for the present, that Congress had the right to bind three thousand Indian citizens, by a proceeding against only ten, it still devolved upon the court to ascertain, and to judicially determine, whose decrees they were vacating. The defendant's name nowhere appears in any part of the record in that case. We believe that this judgment must be held void as to every one not made a party thereto.

Did Congress, however, have the right to provide that the court claimants should be represented by the ten defendants named in that suit? These court claimants lived within the jurisdiction of the citizenship court. The Act of Congress does not assert that they cannot be served with process. It simply states that they were too numerous to be made parties. This was a judicial fact to be determined by the courts, and not by the legislative department of the Government. It is now well settled that no person can be bound by a personal judgment unless he is made a party to the action. One exception to the rule is, that courts of chancery where all the parties cannot be brought in, may make an order, requiring a few to defend for all. This is a rule for the court to promulgate, however, and not the legislature. If the ten parties

within the jurisdiction of the Citizenship Court could be served with process, there is no reason why all could not be served. The question of convenience should not be permitted to supplant the most essential of all judicial requirements, viz: that no man's property shall be taken without a hearing. In this case, the defendant's property which he is occupying, by virtue of his decree is confessed to be worth more than $5,000. A suit is instituted before a commission, and an omnibus decree is rendered, undertaking to deprive him of all this property, without a hearing, and without a finding that his decree was, [redacted], defective or irregular. If people's property is thus subject to the will of Congress, we submit that no man is safe in his holdings.

Before Hill could be affected by the decree of the Citizeship Court, he should have been made a party thereto, and it should have been found by that body that his decree was defective, because of the irregularities complained of. The Citizenship Court had no right or authority to *assume* that he was situated similarly to the other defendants.

In the case of Harwood vs. G. & O. Railroad Co., 84 U. S. 78, a bill was filed to vacate a decree rendered

in the same court, in a suit by Carlisle against the C. & O. Railroad Company. The suit by Carlisle was to foreclose a mortgage on the road. The second suit alleged fraud and collusion between the plaintiff in the first suit and his confederates. It was alleged that they had entered into a conspiracy, by which the road was permitted to fall into decay; that the interest on the bonds was wilfully neglected, in order that the property might be sold under that mortgage; that the conspiracy was carried out, the road sold for a small sum, and the stockholders of the road thereby injured. In the suit to vacate this decree, the original plaintiff, Carlisle, was not made a party. Mr. Justice Hunt, speaking of this says:

> "Mr. Carlisle, the plaintiff in the suit in which the decree is sought to be vacated, is not a party to this proceeding. In the former suit all the forms of law, at least, were complied with. The parties having interest sought to be foreclosed were made parties, a decree was then taken in the ordinary form, that they be foreclosed, and that the property be sold. A sale was had, under which the present defendants claim title. This was done upon prayer of Mr. Carlisle, by his authority and upon his procurement. Third parties now come into court and ask that all these proceedings, complete according to the forms of law, and sanctioned by the decree of the court

taken at the request of Mr. Carlisle, and for which he is responsible, be vacated and declared fraudulent and void. This is sought to be done without his knowledge, and no opportuity is geven to him to sustain his decree or to rebut the alleged fraud, and no reason or excuse is given why he is not made a party. This is against authority and principle. No case is cited to justify it, and it is believed that none can be found. The judgments of courts of record, would be scarcely worth obtaining if they could thus be lightly thrown aside. *The absense of the plaintiff in the original suit is a fatal defect.*"

Apply this doctrine to the case at bar. Hill, though within the jurisdiction of the Citizenship Court, was not made a party in the Riddle case. He was given no opportunity to show that the decree under which he claimed was valid. He was not given an opportunity to show that he was not situated similarly to the ten defendants in that suit. The tribes, who brought that suit in the Citizenship Court did not introduce any testimony to show that he was so situated; and the omnibus finding of that court, without a line of testimony, that the defendant was so situated, is such an inconceivible misconception of the law, that the defendant cannot be effected thereby.

One of two things *must* have occurred, before he

could have been bound by that decree. Either he must have been made a party to that suit, and given an opportuity to show that he was not situated similarly to the defendants therein, or else it was incumbent on the Choctaw and Chickasaw Nations, who were seeking to vacate his judgment, to show *by proof* in that proceeding, that he was so situated.

If there had been any testimony upon this question it might be contended that the findings of the court would be binding until reviewed. It is admitted by the demurrer, however, that *not one word of testimony was introduced upon this question,* and that the finding by the Citizenship Court that he was so situated was an *erroneous assumption* of fact.

THIRD

The Act of July 1, 1902, which established the Citizenship Court, submitted to the determination of that body two questions:

> "First— Was it indispensable that both the Choctaw and Chickasaw Nations should be made parties to proceedings in the United States Courts, wherein parties were admitted to Indian Citizenship; and,

"Second—Should the proceedings in those courts have been confined to a review of the testimony taken before the Dawes Commission."

"It will be remembered that the Citizenship Court determined both these contentions in favor of the tribes, and held that they were so fundamental in their character as to render all decrees admitting parties to citizenship, void."

We contend that these two questions were in issue in the various cases that came to this court from the United States Courts in the Indian Territory admitting parties to Choctaw and Chickasaw citizenship, and that those questions were forever set at rest by the opinion of this court in the case of Stephens vs. the Cherokee Nation, (*supra.*) It will be remembered that the rules promulgated by the Dawes Commission required applicants for citizenship to make the Governor of the tribe in which citizenship was sought a party to the proceedings. The Choctaw and Chickasaw Nations were separate political communities each having a government, consisting of a legislative, executive and judicial department.

In the proceedings before the Dawes Commission and before the United States Courts in the Indian Territory, these tribes were treated as different political entities.

The government of the United States, in its dealings with these tribes had always so regarded them. Each tribe had always exercised the right to determine its own citizenship, so that membership in one tribe was a matter with which the other had no concern. After the courts in the Indian Territory had finally determined all applications for membership, more than one hundred and fifty cases were, by these two tribes, appealed to this court under the Act of July 1, 1898.

In some of these cases, it was the Chickasaw Tribe that appealed, and in some it was the Choctaw Tribe. While neither of the tribes at that time thought the matter of sufficient importance to contend, that both the tribes should have been parties to the proceedings in the courts in the Indian Territory, it is clear that they were at liberty to make this contention, in those proceedings, and, having the right to do so, they were clearly bound to bring forward every argument that could be urged against the constitutionality of the legislation that authorized the Dawes Commission and the United States Courts in the Indian Territory to determine questions of citizenship in the Choctaw or Chickasaw Tribes.

As these questions were at isssue in those cases and

were finally concluded by the opinion of this court in the Stephens case, it cannot be successfully contended that Congress had the power to submit them to re-examination by the Citizenship Court. We believe we are safe in making the statement, that Congress cannot, constitutionally, submit the opinions of the Supreme Court to review by other and subordinate tribunals. In the Gordon case (*supra*). Chief Justice Taney says:

> "The existence of this court is, therefore, as essential to the organization of the government, established by the Constitution, as the election of a president or members of Congress. It is the tribunal which is ultimately to decide all judicial questions confided to the Government of the United States. *No appeal is given from its decisions, nor any power given to the legislative or executive departments to interfere with its judgments or process of execution.*"

It is true that this opinion of the Chief Justice appears as an appendix in the reports of this court, and does not seem ever to have been formally adopted. It has, however, been four times approvingly cited by this court and in one case, (La Abra Mining Company vs. United States 175 U. S. 423,) formally adopted as a rule of decision. Referring to the opinion in the Gordon case, Mr. Justice Harlan says:

"The Chief Justice died before the case was decided and the opinion prepared by him in recess was not formally accepted. But if the court approved his views, as it undoubtedly did, the appeal was dismissed upon the ground that Congress could not authorize or require this court to express an opinion in a case in which its judicial power could not be exercised, and where its judgment could not be final and conclusive upon the rights of the parties."

In U. S. vs. O'Grady, 89 U. S. 641, Mr. Justice Clifford says:

"Judicial jurisdiction implies the power to hear and determine a cause, and, in as much as the Constitution does not contemplate that there shall be more than one Supreme Court, *it is quite clear that Congress cannot subject the judgments of the Supreme Court to the reexamination and revision of any other tribunal, or any other department of the government.*"

If it were once admitted that Congress can submit the judgments of the Supreme Court to review or to reexamination by boards or commissions, or special courts created by Congress, it becomes apparent that the independence of the judiciary is lost, and the decisions of the Supreme Court made subject to the will of Congress. Assuming, therefore, that we are correct in our contention, that the judgments of the Supreme

Court are not subject to review by inferior tribunals, let us examine the authority of Congress to authorize the Citizenship Court to vacate the decrees of the United States Courts for the Indian Territory, which had been affirmed by the Supreme Court.

The defendant, Hill, had procured a decree in the territorial court declaring him to be a member of the Choctaw tribe of Indians. This decree was, by the Supreme Court of the United States, affirmed. In the Stephens case (*supra*) it was contended by the Indian tribes that no appeal could be allowed from the Dawes Commission to the United States Courts of the Indian Territory. It was contended that appeals to the United States Courts could only be allowed from *judicial* tribunals—that the Dawes Commission was not a judicial tribunal, and that therefore no appeal could be allowed from that body to the courts. Chief Justice Fuller, who rendered the opinion, answers this contention as follows:

> "As to the first of these objections, conceding the constitutionality of the legislation otherwise, we need spend no time upon it, as it is firmly established that Congress may provide for the review of the action of commissions and boards created by it, exercising only *quasi* judicial powers, by the transfer of their proceedings and decisions, denominated appeals

> for want of a better term, to judicial tribunals for examination and determination *de novo;* and, as will be presently seen, could certainly do so in respect of the action of tribal authorities."

The court recognized the correctness of the contention that an appeal can not be allowed from a *Commission* to a *Court*. The word "appeal," however, was used for want of a better term. There was, strictly speaking, no appeal from the Dawes Commission, but the matter was simply transferred from the Commission to the courts, where the cases must necessarily be tried *de novo*. In other words, the courts *could not* try the cases *as appellate courts*, but *must* try them *de novo*. The Dawes Commission had exercised *quasi* judicial powers. The court, however, was the first judicial tribunal in which the cases could be tried.

Was not the second contention made by the Tribes, viz: That both tribes were necersary parties to the suits in the United States courts, decided adversely to their claims. There is no contention that the act of June 10, 1896, did, in express terms, require both tribes to be parties to the litigation. The Citizenship Court, in its famous opinion in the Riddle case, did not contend that the *act* required notice to both tribes.

That court held that, in as much as both tribes owned the Indian lands in common, and in as much as membership in one tribe carried with it the right to landed interests in both tribes, therefore *both* were necessarily interested in knowing who were the members of the respective tribes—that, since the act of 1896, provided that the Dawes Commission might hear applications for enrollment without notice to both tribes, it provided for establishing a status that carried with it property rights in both tribes, without joint notice, and was therefore unconstitutional.

That court filed a very elaborate opinion, which contained the grounds upon which it based its decree that sought to vacate the decrees of the United States courts, admitting parties to citizenship.

We are somewhat perplexed to know just how to bring this opinion to the attention of this court. No provision was made for its publication. The life of the court has long since expired by operation of law, and under the act that created it there is no legal custodian of its records. Its members, however, in their return to the rule to show cause in *Ex Parte* Joines, 191 U. S. 93, filed a copy of that opinion as a part of their return.

It may be found, therefore, among the records of this court.

For many reasons that will readily suggest themselves, upon its reading, it is a most interesting document, and we beg to commend it to the attention of this court.

While the Judge who rendered this opinion disclaimed any intention to overrule the opinion of the Supreme Court in the Stephens case, his whole argument is based upon the idea that the act of 1896, in failing to provide for notice to both tribes, was unconstitutional. Stripped of all embellishment, the opinion simply held that the act of June 10, 1896, was unconstitutional; notwithstanding the Supreme Court, in express terms, and in a most elaborate opinion, held it *was* constitutional.

The language of this court in the Stephens case is as follows:

> "We repeat, that in view of the paramount authority of Congress over the Indian Tribes, and of the duties imposed on the government by their condition of dependency, we can not say that Congress could not empower the Dawes Commission to determine, *in the manner provided,* who was entitled to citizenship in each of the Tribes, and make out a correct roll of membership in the manner provided for in the act of June 10, 1896. * * * *"
>
> "We hold the entire act constitutional."

Beyond question, that act did not contemplate that both Tribes should be parties to the litigation, because when it comes to provide for the appeal, or rather the transfer from the Dawes Commission to the United States court, it is said that:

> "If the Tribe, or any person, be aggrieved with a decision of the tribal authorities, or the Commission, provided for in this act, *it* or *he* may appeal from such decision to the United States District Court."

It does not say "they" may appeal, a word that would have been used had the act contemplated notice to both tribes, but that "it," that is the tribe in which membership was sought, might appeal.

In the Stephens case the only question determined was the constitutionality of the act of June 10, 1896. The tribes insisted that the act was unconstitutional. Those holding judgments, among whom was the defendant Hill, contended that the act *was* constitutional. The Supreme Court held that the act was constitutional, and in so doing necessarily foreclosed forever all objections that could be raised against its constitutionality. While the *de novo* question was urged in that case, we concede that the question of notice to both tribes was not presented in briefs of counsel then representing the tribes. Attorneys

distinguished for their learning filed elaborate briefs, attacking the constitutionality of the act of 1896, but overlooked presenting the argument, that the citizenship court afterwards held was fatal to the constitutionality of that law.

However, the fact that the argument was not presented does not, in the least, affect the principle that, so far as the law is concerned, that question is forever set at rest.

In that controversy the tribes were bound to bring forward every argument that could be urged against the constitutionality of the act of 1896. In this connection we call the court's attention to U. S. vs. C. & O. Land Company, 192 U. S. 355. In this case patents were issued to the Oregon Central Railway, under the act of Congress, July 2, 1864. This act granted certain land to the state of Oregon to aid in the construction of roads. In March, 1899, Congress, upon request of the Oregon legislature, passed an act authorizing the United States to bring suit in the circuit court for the purpose of declaring the lands forfeited. Suit was brought under the terms of that act, and decided against the United States. A subsequent suit was brought to declare the lands forfeited but different grounds of forfeiture were set up. It was

held that the first suit was *res judicata*. Mr. Justice Holmes says:

> "It may be the law of Scotland that judgment is not a bar to a second suit to reach the same result, by a different *medium concludendi*. But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He can not even split up his claim; and a *fortiori* he can not divide the grounds of recovery. * * * * It can not be supposed that the United States was not at liberty to raise the issues which defendants and intervenors were given the right to raise. * * * * If the United States were at liberty to state its own grounds for claiming the land, it was bound to do so on the same principles and rules of jurisprudence as other suits in equity are tried therein."

In the case of Werlein vs. New Orleans (187 U. S. 390) the same doctrine is announced. The facts in that case were substantially as follows:

One John Clein brought suit against the city of New Orleans, and recovered judgment for $89,000. Execution was levied upon a tract of land belonging to the city. Before the sale of the property, the city filed suit in equity to enjoin the sale, upon three distinct grounds therein alleged. Tem-

porary injunction was issued, and upon final hearing this was dissolved and the property sold. Thereafter the city brought a second suit against the vendee of the purchaser at the execution sale. In this suit the city relied upon a different ground of recovery from that set up in the injunction suit. In the second suit it was contended that the property had been dedicated to the city for public uses, and it was not subject to execution. The defendant relied on the first suit as *res judicata*, and offered in evidence a copy of the decree in that case. This was excluded by the trial court, upon the ground that, as the city in the second suit relied upon grounds not urged in the first suit, the doctrine of *res judicata* did not apply. Justice Peckham delivered the opinion of the court, and stated that, if the city in the first suit had relied upon the contentions urged in the second suit, it must have been successful. The court held, however, that the city was compelled in the first suit to set forth every ground of recovery it had.

A further decision of the Supreme Court, Davis vs. Brown, 94 U. S. 428, announced the doctrine :

> " A judgment is not only conclusive as to what was actually determined respecting such demand, but as to each matter which might have been brought forward and determined respecting it."

The case of U. S. vs. Throckmortin, 98 U. S. 61, is in point. A bill was filed by the United States wherein it sought to set aside a decree, theretofore rendered by the District Court of the United States, confirming a grant which had been made, by the Board of Commissioners of private land claims in California, to one Richardson. The grounds relied upon in the second suit were, that the findings of the Board of Commissioners, as well as the decree of the District Court, had been procured by fraud. A demurrer was sustained to the second bill upon the ground that the charge of fraud could have been investigated in the prior suit, and was therefore *res judicata.* Mr. Justice Miller says :

> " There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely, ***interest rei publicae ut sit finis litium,*** and ***nemo debet bis vexori pro una et edam causa.***"
> ¶ " If the court has been mistaken in the law there is a remedy by writ of error. If the jury has been

mistaken in the facts the remedy is by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the *same* proceeding, relief is given in the *same* suit, and the party is not vexed by another suit for the same matter. So, in a suit in chancery, on proper showing, a rehearing is granted. If the inquiry complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the *same* suit, and the rule framed for the repose of society is not violated. * * * *

"In all these cases, and many others which have been examined, relief has been granted on the ground that by some fraud, practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court. * * * * * * * * * *

"To overrule the demurrer to this bill would be to retry, twenty years after the decision of that tribunal, the very matter which they tried, on the grounds of fraud in the document on which the decree was made. If we can do this now, some other court may be called on twenty years hence to retry the same matter on another allegation of fraudulent

combination in this suit, to defeat the ends of justice. And so the number of suits would be without limit and the litigation endless, about the question of the validity of this document."

Just so with the question before this court. The Supreme Court of the United States in the Stephens case decided that the act of June 10, 1896, was constitutional. They decided also that the cases should have been tried *de novo* in the territorial courts. If, after the lapse of four years, Congress had the right to create an inferior tribunal, and authorize it to retry these same questions, there is no reason why it may not, at the end of another four years, establish another tribunal to undo the work of the citizenship court, and the litigation might be extended *ad infinitum.*

It would be difficult to find a case illustrating more forcibly the importance of the doctrines of *res adjudicata* than the one at bar. In this connection we wish to direct the court's attention to the case of Dukes vs. Goodall, 82 S. W. Rep. 702. After the decision of this court in the Stephens case (*supra*) G. W. Dukes, governor of the Choctaw Nation, and twenty-five other Choctaw citizens, together with D. H. Johnson, governor of the Chickasaw Nation, and twenty-five other Chick-

asaw citizens, filed a complaint in equity in the United States court for the Southern District of the Indian Territory, against William Goodall and ten others, as representatives "Of all persons claiming to be members of the Chocktaw or Chickasaw Nations or Tribes of Indians, by virtue of alleged decrees of the United States courts for the Central and the Southern Districts of the Indian Territory, sitting respectively at South McAlester and Ardmore, and commonly known as 'court citizens.'"

The bill was dismissed; the case was taken to the court of appeals for the Indian Territory, and was there pending at the time of the decision of this court in the case of *Ex Parte* Joines (*supra*).

It was there asserted that all such judgments were void, "the process had therein was contrary to the due course of legal procedure in force in the Indian Territory, and contrary to all those rules and principles which have been established by the judiciary of the United States of America for the protection and enforcement of private rights." It was also contended that, as the lands of the two tribes were held by individual members as tenants in common, they should all have been parties to such proceedings, and that, in as much as the act of June 10, 1896,

did not provide for such notice, it was unconstitutional. In speaking of this contention, the court, through Justice Clayton, says: "Passing the question as to whether there is a misjoinder of parties defendant, we will first consider the constitutional questions. It is, that the act of Congress under which the United States courts proceeded in the trial of the cases, did not provide for notice in these cases to the plaintiffs in this case, and therefore the decrees were found without due process of law, as provided by the constitution. Upon this point it is sufficient to say that in the case of Stephens vs. The Cherokee Nation, 174 U. S. 445, the supreme court of the United States, in passing upon *all the constitutional phases* of that act says: 'We hold the entire act to be constitutional.' * * * * Under the provisions of that act they were to be tried *de novo*, which procedure the supreme court in the same case has *clearly and unmistakably held to be proper and correct*."

In Cooley's Constitutional Limitations, seventh edition, pages 79 to 81, it is stated:

> "A decision once made in a particular controversy, by the highest court empowered to pass upon it, is conclusive upon the parties to the litigation and

their privies, and they are not allowed afterward to revive the controversy in a new proceeding for the purpose of raising the same or any other questions. The matter in dispute has become *res judicata*, a thing definitely settled by judicial decision; and the judgment of the court imports absolute verity. Whatever the question involved—whether the interpretation of a private contract, the legality of an individual act, or the *validity of a legislative enactment*—the rule of finality is the same. The controversy has been adjudged; and once finally passed upon, it is never to be renewed. It must frequently happen, therefore, that a question of constitutional law will be decided in a private litigation, and the parties to the controversy, and all others subsequently acquiring rights under them in the subject matter of the suit, will thereby become absolutely and forever precluded from renewing the question in respect to the matter then involved. The rule of conclusiveness to this extent is one of the most inflexible principles of the law; in so much that even if it were subsequently held by the courts, that the decision in the particular case was erroneous, such holding would not authorize the reopening of the controversy in order that the final conclusion might be applied thereto."

The doctrine is nowhere more clearly stated than in Black on Judgments, Vol. 2, Sec. 500;

" That the solemn and deliberate sentence of the law, pronounced by its appointed organs, upon a disputed fact or state of facts, should be regarded as a final and conclusive determination of the question litigated, and should forever set the controversy at rest, is a rule common to all civilized systems of jurisprudence. But it is more than a mere rule of law. It is more even than an important principle of public policy. *It is not too much to say that this maxim is a fundamental concept in the organization of every jural society.* For, unless every judgment should at some point become final, and have the quality of establishing its contents as irrefragable truth, litigation would become interminable, the rights of parties would be involved in endless confusion, the courts, stripped of their most efficient powers, would become little more than advisory bodies, and thus the most important function of government—that of ascertaining and enforcing rights—would go unfulfilled."

The same author, in Sec. 503, says :

" It would be idle, however, to adduce authorities in support of a proposition so familiar, and we are content merely to quote from one or two opinions in which its reasons or importance have been especially well stated. In a leading case in Massachusetts, Chief Justice Shaw observed: 'It is a principle lying at the foundation of all well conducted jurisprudence, that when a right or fact has been

judicially tried and determined by a court of competent jurisdiction, the judgment thereon, so long as it is unreversed, shall be conclusive upon the parties and those in privaty with them in law or estate. The ground of such principle, we think, when rightly understood, is that it presents evidence of a fact of so high a nature, that nothing which could be proved by evidence, *aliunde*, would be sufficient to overcome it; and, therefore, it would be useless for a party, against whom it can be properly applied, to adduce any such evidence, and accordingly he is estopped or precluded by law from doing so. Such is the character of an estoppel by record, as in case of an issue on a question of fact judicially tried and decided.' Still more emphatic is the testimony of the Federal Supreme Court to the inviolability of this principle. In the case selected for citation, the remarks of the learned Judge were specifically directed to the legal system of Louisiana, but his observations will apply with equal truth to any of the United States. He said: 'Under the system of that state, the maintenance of public order, the repose of society and the quiet of families require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. So deeply is this principle implanted in her jurisprudence, that commentators on it have said that *res judicata* renders white that which is black and straight that which is crooked. No other evidence can afford strength to the presumption of

the truth it creates, and no arguments can detract from its legal efficacy.'"

The case of McCullough vs. Commonwealth of Virginia, 172 U. S. 102, is valuable as illustrating the immunity of judgments and decrees from legislative attack. Under the act of March 30, 1871, a large portion of the public debt of Virginia was refunded, the act providing that the coupons of the new bonds should be receivable for all taxes, debts and dues owing the state. The act of March 7, 1872, in effect, prohibited public officers from receiving these coupons in payment of public dues. The Supreme Court of that state having decided that mandamus was a proper remedy to compel the acceptance of such coupons by the collecting officers, on January 14, 1882, the legislature again took a turn at the matter, by enacting that any taxpayer seeking to use coupons in payment of taxes, should, first, pay the taxes in money, and thereafter bring a suit to establish the genuineness of the coupons, which, if decided in his favor, would enable him to obtain from the treasurer a return of the money paid. On April 18, 1882, the courts were deprived of jurisdiction to issue mandamus to compel public officers to receive such coupons, and finally, in 1894, the legislature repealed the act which authorized

the bringing of suits to establish the genuineness of the coupons. In the meantime, however, before the passage of this repealing act, the plaintiff had brought suit in the Circuit Court of the city of Norfolk and obtained a judgment, establishing the genuineness of certain coupons tendered in payment of taxes. On March 23, 1894, the Supreme Court of Appeals of that state reversed this judgment. It thus became important to determine what rights were granted the plaintiff by virtue of the decree of the Circuit Court establishing the genuineness of his coupons. This court held that the judgment carried with it vested rights, that could not be disturbed by subsequent legislation. This is the language used:

> "But there are more substantial reasons than this for not entertaining this motion. At the time the judgment was rendered in the Circuit Court of the city of Norfolk, the act of 1882 was in force, and the judgment was rightfully entered under the authority of that act. The writ of error to the Court of Appeals of the state brought the validity of that judgment into review, and the question presented to that court was, whether at the time it was rendered it was rightful or not. *If rightful, the plaintiff therein had a vested right which no state legislation could disturb. It is not within the power of a legislature to take away*

rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment, the power of the legislature to disturb the rights created thereby ceases. So, properly, the Court of Appeals in considering the question of the validity of this judgment, took no notice of the subsequent repeal of the act under which the judgment was obtained, and the inquiry in this court is not what effect the repealing act of 1894 had upon proceedings initiated thereafter, or pending at that time, but whether such a repeal divested a plaintiff in a judgment of the rights acquired by that judgment. And in that respect we have no doubt that the rights acquired by the judgment under the act of 1882 were not disturbed by a subsequent repeal of the statute."

Compare this case with the one at bar, and the applicability of the opinion becomes at once manifest. The decree which was declared to be impervious to legislative attack, was not a judgment for money or one establishing title. It simply established the status of certain coupons. Incidental to this decree was the right to use these coupons in the payment of public dues. While this right was an intangible one, it was none the less valuable, and it was *this* that protected the decree against subsequent legislation.

As a necessary incident to the decree establishing Hill's citizenship in the Choctaw Nation, was the right to enjoy all the privileges and immunities of other members of the Tribes. This was a most valuable privilege, and one that we submit could not be destroyed by subsequent legislation. It is an error to suppose that the right to allot lands was the only valuable privilege that attached to Choctaw citizenship.

This court, perhaps, takes judicial knowledge of the fact that, at the time of the rendition of this decree, there were no public schools in the Indian Territory at which non-citizens in the Indian Tribes could educate their children. The Chocktaw and Chickasaw Nations, at the public expense, maintained schools at which all the members of these Tribes might be educated, both board and tuition being furnished at the expense of the government. The moment that Hill was admitted to citizenship by the decree of the United States Court he became entitled necessarily to the right to have his children enjoy these advantages.

He had the right, likewise, to reduce to his possession the land in controversy, and enjoy the rents and revenues arising therefrom.

At the date of the passage of the Curtiss act he was in possession of this land, and had in the meantime placed $1000 worth of improvements thereon, acting upon the integrity of the decree admitting him to citizenship; and by the express terms of this act he had the right to select this particular tract of land as his allotment. This selection he made. For more than four years he claimed and used the property as his own. The right to do this, while an incidental one, was based wholly upon the integrity of the decree admitting him to citizenship. We submit that this was as valuable a property right as was the right of McCullough to use his Virginia coupons in the payment of public dues. We submit, also, that it was a right so valuable that Congress could not destroy it, without compensation.

These authorities are sufficient to establish the proposition, that the question which the Citizenship Court made the basis of its decree, in attempting to vacate the decree of the Territorial Courts, had already been forever set at rest by the opinion of the Supreme Court in the Stephens case. It is indeed amazing that it should have been contended that Congress had the right to submit these questions to the determination of the Citizenship Court.

It should be observed that the Riddle case did not reach the Citizenship Court by the ordinary methods of appeal.

The author of sections thirty-one, thirty-two and thirty-three of the act of July 1, 1902, evidently contemplated that the two questions that section thirty-one sought to submit to the determination of the Citizenship Court would be determined to be without merit. This is evident from the power conferred in section thirty-two. It is there made an *appellate court*, and the character of power sought to be conferred upon it is of an entirely different nature from that sought to be conferred in section thirty-one.

> "The power to *vacate* judgments is an entirely different matter from the power to *reverse* judgments. It is a power inherent in, and to be exercised by, the court which renders a judgment, and to *that* court, and *no other*, applications to set aside judgments should be made." (Black on Judgments, volume 1, section 207.)

It may be safely asserted that no court has the right to set aside a decree other than the court rendering it, unless the decree be procured by fraud, or there be some other intervening agency sufficient to make it unconscionable to permit it to stand. If the irregularities, insisted upon by

the Citizenship Court have merit in them, they can yet be brought to the attention of the courts that rendered the decrees, and if they are fundamental in their character, these courts still have jurisdiction and power to correct them. Congress has not the power, however, to create an administrative tribunal, call it a court, and invest it with power to set aside the decrees of the regularly constituted courts. It is impossible to find authorities exactly applicable to the conditions, for the reason that no such tribunal as the Citizenship Court ever existed before.

Prior to the act of June 10, 1896, the question of membership in the Five Civilized Tribes had been left to the determination of the respective tribal authorities. By that act, however, the United States "Assumed full control over the Five Civilized Tribes, and took upon itself the determination of membership therein," by virtue of the plenary power that Congress exercised over the tribes. There is no doubt, indeed, it is expressly held in the opinion of the Circuit Court of Appeals in this case, that Congress might itself, by direct enactment, have determined the question of membership in each tribe. It being manifestly impracticable for Congress to undertake, itself,

to discharge this duty, it was remitted to the determination of the Dawes Commission, and the United States Courts in the Indian Territory. The act did not undertake to prescribe any mode of procedure that should govern the Dawes Commission in the determination of questions of citizenship. This matter was left entirely to the discretion of the Commission. The act clothed the Commission with power and authority—

> "To administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons and papers * * * * and to use every fair and reasonable means within their reach, for the purpose of determining the rights of persons claiming citizenship, or to protect any of said Nations from fraud or wrong, * * * * and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to rights of citizenship in said several Tribes: Provided, that if the Tribe or any person be aggrieved with the decision of the tribal authorities, or the Commission provided for in this act, it or he may appeal from such decision to the United States District Court."

It is beyond question that, under this act, the Dawes Commission had the power to prescribe the rules that should govern it in determining applications for citizen-

ship, and to provide the kind of notice, and the manner of service upon the Tribe in which membership was claimed. That the Dawes Commission was acting within the authority expressly granted by this act, when it provided that notice should be given to the Governor of the Tribe in which membership was sought, can not be questioned. If, therefore, it was indispensable, as held by the Citizenship Court, that notice of the proceedings had in the United States Court should have been had upon both the Choctaw and Chickasaw Tribes, this resulted, not because of anything contained in the act of Congress, but because membership in either Tribe carried with it property rights, and in as much as both tribes held the property in trust for their respective members, it was essential under the Constitution that both tribes should have notice of such proceedings. This is exactly what the Citizenship Court held. Not that the act required notice to both Tribes, but that both Tribes were, under the Constitution, entitled to notice, and therefore that the act, in failing to provide for notice, was unconstitutional. This, too, in the face of the opinion in the Stephens case, holding the act constitutional.

In the case of Cherokee Nation vs. Hitchcock, 187

U. S. 294, this court, in speaking of the act of June 28, 1898, says:

> "The decision in Stephens vs. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722, is particularly in point, as that case involved the validity of the very act under consideration, and the ***precedent correlative legislation,*** wherein the United States practically assumed the full control over the Cherokees, as well as the other Nations, constituting the Five Civilized Tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property. The plenary power of control by Congress over the Indian tribes and its undoubted power to legislate, as it had done through the act of 1898, directly for the protection of the tribal property, was, in that case, reaffirmed."

The constitutionality of this act was again attacked in the case of Morris vs. Hitchcock, 194 U. S. 384, where the court says:

> "The question of the validity and construction of that act was under consideration in Stephens vs Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722, and Cherokee Nation vs. Hitchcock, 187 U. S. 294, 47 L. ed. 183. 23 Sup. Ct. Rep. 115, and in view of the rulings in those cases the constitutionality of the statute is not now open to question."

The net result of the unwise and unfortunate act of July 1, 1902, is, that the decisions of this court upholding the constitutionality of the act of June 10, 1896, have been overruled and set at naught by the Citizenship Court, and many hundreds of Choctaw and Chickasaw Indians deprived of their earnings, that were invested upon the integrity of the decrees of this court.

The necessary and inevitable effect of the decree of the Citizenship Court in the Riddle case was to declare the act of June 10, 1896, unconstitutional, and thus reverse the decision of this court in the Stephens case. In as much as that act did not require notice to both Tribes, it would have been a useless proceeding had the courts in the Indian Territory given such notice, after the cases were transferred from the Dawes Commission. If notice is essential in any case, it must be either for constitutional reasons or else because the statute requires it. If a statute is defective, in failing to require notice, it is well settled that it can not be made valid by any act of the court in actually giving notice.

> "It is not enough that the owners may, by chance, have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them and give them the right to a hearing

> and an opportunity to be heard. It matters not upon the question of the constitutionality of such a law, that the assessment of its facts be fairly apportioned. The constitutional validity of law is to be tested, *not by what has been done under it, but by what may, under its provisions, be done.*" (Stuart v. Palmer, 74 N. Y. 183.)

The Choctaw and Chickasaw Nations were charged with notice of the provisions of the act authorizing the determination of questions of citizenship by the United States Courts; therefore, if the courts had actually served notice of such proceedings upon both Tribes, it would have been an act of supererrogation, since the law did not require such notice, and the Indian Tribes were charged with knowledge of the provisions of the statute. (Reetz vs. Michigan, 188 U. S. 505, Rees, vs. Watertown, 19 Wall 107.)

It results, therefore, that since the act did not require notice to both tribes, and since the courts were without authority to give such notice, *if* the Citizenship Court was right in holding that in such proceedings notice to both tribes was indispensable, it must necessarily be because the act was unconstitutional in failing to provide such notice, and therefore that this court was in error,

when it held, in the three cases heretofore referred to, that the act was unconstitutional.

FOURTH.

The act providing for the creation of the Citizenship Court was class legislation, and therefore unconstitutional. The act of 1890 put the Constitution in force in the Indian Territory, and, since that time, the various members of the Indian tribes have been as much entitled to its protection as citizens of the United States.

The act of June 10, 1896, applied alike to all the Five Civilized Tribes. The same laws of Congress, the same rules of the Dawes Commission, and the same proceedings in the United States Courts that governed in application for citizenship in the Chickasaw and Choctaw Tribes applied likewise to the application for citizenship in the Creek, Cherokee and Seminole Nations. In those three Tribes, appeals taken to the United States Courts were tried *de novo*, just as they were in cases affecting Choctaw and Chickasaw citizenship.

The act of July 1, 1902, which established the Citizenship Court, did not, in any way, undertake to affect the decrees that had been rendered by the courts of the

United States admitting parties to citizenship in the Creek, Cherokee and Seminole Tribes. Why citizens in the Chickasaw and Choctaw Nations, who had literally complied with the act of Congress, as well as with the rules of the Dawes Commission, and who had procured decrees declaring them to be members of those Tribes, should be singled out and subjected to burdens that were not imposed upon applicants for citizenship in the other three Tribes, is past finding out. It is class legislation, and ought not to receive the sanction of the courts.

> "A statute would not be constitutional which should prescribe a class or party for opinion's sake, or which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens, from which others in the same locality, or class, are exempt." (Cooley's Constitutional Limitation, seventh edition, page 556.)

The same author, on page 560, says:

> "Special courts can not be created for the trial of the rights and obligations of particular persons; and those cases of legislative acts granting new trials, or other special relief in judicial proceedings, while they have been regarded as usurpations of judicial authority, have also been considered obnoxious to the objection that they undertook to suspend

general laws in special cases. The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges or legal capacities, in a manner unknown before to the law, could be sustained, notwithstanding its generality."

FIFTH.

The defendant Hill, in his application for citizenship, complied literally with the rules adopted by the United States government and its agents, and that government, as well as the Choctaw and Chickasaw Tribes, is estopped to claim that the proceedings admitting him to citizenship were irregular. The act of June 28, 1898, provided:

> "That all the lands within the Indian Territory belonging to the Choctaw and Chickasaw Tribes shall be allotted to the members of said Tribes, so as to give to each member, so far as possible, a fair and equal share thereof."

This act was ratified by the Choctaw and Chickasaw Nations. More than a year prior to this, the decree of the United States had declared that Hill was a member of the Choctaw Tribe of Indians. At the time the Choctaw and Chickasaw Nations agreed to this act, it was known that Hill had been pronounced by the decree of the court to be a member of the Tribe. It is beyond dispute that this act contemplated an allotment of lands to Hill, as

much so as if he had been personally named in the law. The Tribes, and the United States government, having agreed by this act that the lands might be allotted to him, and he, having acted upon the good faith of these governments, and having expended large sums of money in the improvement of the lands he had selected as his allotment, the Choctaw and Chickasaw Nations were estopped to assert that Hill was not a member of the Choctaw Tribe. The grounds of an estoppel against a state may be drawn either from the acts or omissions of its public officers, or from the action of its legislature, and, likewise, against these tribes, by the action of their commissioners, in making the treaty above referred to. Good faith should characterize the conduct of these tribes in their dealings with their members, and the law will not exempt them from the doctrine of estoppel; like a private person, they may be estopped by their acts, silence, consent or acquiescence.

See People vs. Stephens, 71 N. Y. 527.
Lindsay vs. Haws, 2 Black, U. S. 554.
State vs. Milk, 11 Fed. 389.
State vs. Flint, 89 Mich. 481.
Sanders vs. Hart, 57 Tex. p. 8,
State vs. Dint, 18 Mo. 313.
Alexander vs. State, 56 Ga. 478; and 49 Mo. 216.

SIXTH.

The learned Judge who delivered the opinion of the Circuit Court of Appeals, in summing up the conclusions of that court, uses the following language:

> "The power conferred upon the Dawes Commission and the United States Courts in the Indian Territory by the act of June 10, 1896, and upon the Supreme Court by the act of July 1, 1898, to determine who were citizens of the Choctaw and Chickasaw Nations was *legislative* and not *judicial*, and all judgments and proceedings thereunder were subject to any subsequent legislation of the United States respecting the question of citizenship, which was enacted before allotments of land were made to the successful litigants under the previous legislation."

Is this a correct statement of the law? Is it true that when this court, in the case of Stephens vs. Cherokee Nation (*supra*) upheld the constitutionality of these acts it was not exercising judicial power? The only question which this court was called upon to determine was the constitutionality of the various acts of Congress affecting the Five Civilized Tribes. Can it be that this court was exercising *legislative* and not *judicial* power?

That its decrees were of no more effect than if they had been rendered by an "Indian Agent, a Commission or a Committee?"

The case of United States vs. Coe (155 U. S. 76) is exactly in point. The act of March 3, 1891, provided for the establishment of "a court of private land claims to hear and determine the pleas of all persons claiming lands within the limits of the Territory derived by the United States from the Republic of Mexico, and embraced within the Territory of New Mexico, Arizona and Utah, and within the states of Nevada, Colorado or Wyoming by virtue of any Spanish or Mexican grant, by concession or warrant." The act provided that any decree rendered by such court "should not affect the private rights of persons as between each other, but that its decrees and acts should be conclusive of all rights as between the United States and all persons claiming any interest or right in such land." It also provided that either the United States or the claimant might appeal to the Supreme Court. The court, organized under the provisions of this act, rendered a decree confirming a Mexican grant in favor of Coe. The United States appealed, and, in this court, motion was made to dismiss, one of the grounds assigned being

"That the Congress had no power to confer upon this court jurisdiction to entertain an appeal from the decree of the court of private land claims, because the latter is not vested with judicial power, in virtue of any provision of the Constitution." The argument was that since the judges held their offices for a limited time, the court was not one of those mentioned in the third article of the Constitution, and was therefore incapable of receiving judicial power. The Chief Justice, in rendering the opinion of this court, stated:

> "It must be regarded as settled that section one of article three does not exhaust the power of Congress to establish courts."

The motion to dismiss was accordingly denied. The methods adopted by Congress in establishing the court of private land claims and vesting it with jurisdiction, and in establishing United States courts in the Indian Territory, and vesting them with jurisdiction to determine matters of citizenship, and in providing, in both cases, for appeals to this court, are strikingly similar. In each case the court was a creature of Congress. In each case the matters submitted to it for determination were questions over which Congress had plenary power, and which it might have determined by direct enactment, without the

intervention of any other agency. In both cases appeals were allowed to this court.

It was distinctly held in the Goe case, that the court of private land claims, as well as this court on appeal, was exercising judicial power, and that Congress derived its power to create such court and vest it with judicial power from the Constitution. So far as the principle under discussion is involved, it is impossible to differentiate the two cases.

We concede that the question of citizenship in the Indian tribes was one over which Congress had plenary power; that by virtue of its sovereignty and its power to make all needful rules and regulations respecting the territories belonging to the United States, Congress was omnipotent in the Indian Territory; that it was under no obligation to establish in that territory courts of any character; that its power therein was absolute—despotic—and that it possessed the summary disposal of both life and property therein.

The fact remains, however, that Congress *has* established courts there; that it has vested them with jurisdiction to determine this very question of citizenship; and that it *has* required this court, on appeal, to determine

the constitutionality of the acts conferring this jurisdiction. Of what avail was it to put the Constitution in force in that country? Of what avail was it to establish courts and vest them with all the jurisdiction of United States Circuit and District Courts, including the right to determine questions of citizenship? Of what avail was it to impose upon this court the burden of determining the constitutionality of this legislation, if Congress, after the final action of all the courts, was to strike down their most solemn decrees, and make itself the final judge of all questions thus litigated?

The Constitutiou intended that the Judiciary should be independent of Congress, and it would be a dangerous innovation if this court should hold that its final judgments and decrees are subject to the legislative will, in all cases appealed from what are called legislative courts, or where the controversy is about matters originally cognizable by Congress.

What is the final extent to which the decision of the Circuit Court of Appeals reaches? Did Congress possess the power to vest the Citizenship Court with jurisdiction to nullify the decrees of this court, solely because the question of citizenship was a political ques-

tion; or, did it possess this power because the Indian Territory courts were legislative courts? or did it possess this power for both reasons combined? The decision of the Circuit Court of Appeals is based upon the idea that it is because of the former reason. Since, however, the power of Congress was absolute in the Indian Territory, and the question as to whether it would even establish a court there was a political one; and since Congress might have reserved to itself the right to determine by direct enactment all controversies that have been submitted to those courts, it would seem to result, logically, that if the Circuit Court of Appeals is correct in its statement of the law, Congress has power, itself, to review or to authorize any other agency to review, all the final decrees and judgments of the courts in the Indian Territory. On the other hand, if Congress may reverse or vacate the final decrees of this court which come from Indian Territory courts on all questions over which it had plenary power, but which are capable of judicial action, then it would logically follow that, if these questions had been originally submitted to what are called the constitutional courts, to-wit, the Circuit and District Courts of the United States, Congress could still nullify these judg-

ments and decrees, notwithstanding they had been appealed to, and affirmed by, this court. There are numerous instances of legislation, where Congress has delegated to the District Courts the power to determine questions originally political, but which are of a judicial nature, and if Congress, in all such instances, may set aside the decrees and judgments of these courts, after they have become final, on appeal or writ of error to this court, it will result that the Supreme Court is not as independent of the legislative department of the government as it has always been thought to be, but that a large number of its opinions are vulnerable to the interference of Congress, or of such boards, committees or commissions as Congress may see proper to create. If this new doctrine of congressional power is once accepted, and the Supreme Court once enters this field of new and strange construction, we may regretfully expect that the time is fast hastening when the independence of this court will be completely destroyed.

That Congress may relinquish or surrender its plenary power over political questions, and that this power once surrendered may never be resumed, is intelligently stated n the recent case of *Re* Heff, 197 U. S. 488. In this

case Congress had surrendered its plenary powers of guardianship over the petitioner, which it, by subsequent enactment, sought to resume. The court held this could not be done. This case is, we believe, ample authority for our contention that, when Congress delegated the question of determining citizenship in the Indian tribes to the courts, and the litigation thus authorized had become final by the decree of this court, it could not constitutionally resume its original power and disturb the decrees thus made conclusive. The case of Hitchcock vs. The Cherokee Nation, 187 U. S. 183, is not in conflict with our contentions. There was no effort in that case to disturb the judgments of the courts, nor was there any effort to divest property. Indeed, this court is careful to state :

> "There is no question involved in this case as to the *taking* of property. The authority which it is proposed to exercise by virtue of the act of 1898 has relation to the control and development of the tribal property, which still remains subject to the immediate control of the government, even though the members of the Tribes have been vested with the status of citizenship under recent legislation."

The powers sought to be exercised by the Secretary which gave rise to that case, were purely administrative

and have no relation to the questions we are discussing.

In United States vs. Arredondo, et al (6 Peters, 691) a bill was filed in the Supreme Court of the District of Florida against the United States, to establish title to 289,000 acres of land. The property was claimed by virtue of a Spanish grant made on December 22, 1817. Florida, having been ceded to the United States in 1819, Congress, on the 26th day of May, 1824, provided for the appointment of a board of land commissioners, to determine the rights of land claimants, where the quantity claimed did not amount to more than one square league of land. On the 23d day of May, 1828, Congress passed another act, under the terms of which claimants whose rights had not already been determined, under the previous provisions of law, might file their suits in the Supreme Court of the district wherein the land might lie, for the purpose of determining title. The act provided for an appeal by either party to the Supreme Court. The lower court entered a decree confirming plaintiff's title, and the United States appealed to this court, where the case was affirmed. It is clear that Congress originally had the power to determine this claim, without submitting it to the action of the court. Likewise, it had the power

to refer it to the determination of the land commission, and make its finding final, or require its action to be referred back to Congress for further action. It also had the right to refer the entire question to the determination of the court; and this was the method adopted. It is quite clear that this court proceeded upon the idea that it was exercising judicial power in the determination of the question thus submitted. The court, speaking through Judge Baldwin, says:

> "The power to hear and determine a cause is judicial; it is *coram judice* whenever a case is presented which brings this power into action. * * * The laws under which we now adjudicate on the rights embraced in the treaty and its instructions, authorize and direct us to do it ***judicially***, and give its judicial meaning and interpretation as a contract on the principles of justice and the rules of equity. * * * The only question depending is, whether the claimants or the United States are the owners of the land in question. By consenting to be sued, and submitting the decision to judicial action, they have considered it as a purely judicial question, which we are now bound to decide as between man and man, on the same subject matter and by the rules which Congress themselves have prescribed. * * * The acts of 1824 and 1828 authorize and require us to decide on the pending title on all

> the evidence and laws before us. Congress has disclaimed its decision as a *political* question for the legislative department to decide, and enjoined it on us as one *purely judicial.*"

Other expressions in this opinion indicate clearly that this court regarded itself as exercising judicial functions, and that its decree in the case was final. (See United States vs. Old Settlers, Etc., 148 U. S. 427.)

It is interesting to speculate just what the result might have been, had Congress claimed and exercised the power to disturb this judgment, by the creation of some extraordinary tribunal like the Citizenship Court. The Supreme Court of Florida, in which the suit originated, like the courts in the Indian Territory, was a legislative court. The questions submitted to its determination, like the question of citizenship, submitted to the Indian Territory courts, were questions over which Congress originally had plenary power, and which it might have exercised by direct enactment, without submitting them to the determination of any other tribunal. In both cases appeals were allowed to this court, and in both cases the lower courts were affirmed. The judgment of the Supreme Court in the Arredondo case, being a determination of matters that were originally, exclusively, cognizable by

Congress, was not more binding than were the decrees of this court, affirming the Indian Territory courts, in cases admitting parties to citizenship. Could Congress lawfully have created a tribunal, such as the Citizenship Court, and authorized it to set aside the judgment of this court in the Arredondo case?

In Astiazaran vs. Santa Rita Land and Mining Company, (148 U. S., 80) the court had under consideration a controversy, growing out of a Mexican land grant in the Territory of Arizona. Congress made no provision, as it had done in California, by which parties in Arizona could have their claims to lands decided in any judicial tribunal. The provisions for determining such questions were, that the Surveyor General for the Territory, under the instructions of the Secretary of the Interior, should ascertain the nature and extent of such claims, and report the result of such investigation to Congress for its action. While the surveyor's report was pending before Congress for its consideration, the plaintiff brought his suit in the District Court of the Territory of Arizona, to establish title to the land in controversy. This court held, that the matter was one which Congress could properly determine; that while it was pending before Congress, the courts could not in-

terfere, and that whatever action might be taken by Congress would be conclusive upon the merits of the claim upon all other departments of the government. The court, however, recognized the power of Congress to submit the determination of this question to the judiciary, in this language:

> "But the duty of providing the mode of securing their rights, and of fulfilling the obligations imposed upon the United States by the treaties, belonged to the political department of the government, and Congress might, either itself, discharge that duty, or delegate it to the judicial department."

The oft quoted case of Den vs. the Hoboken Land and Improvement Company, (18 How., 272) is authority for the statement, that questions over which Congress has plenary power may be submitted to the courts of the United States, and thus become subjects of judicial action. The court had under consideration a title based upon a sale made by the Marshal of the United States, under what is known as a distress warrant, issued by the Solicitor of the Treasury, and levied upon property of the Collector of Customs for the port of New York, for a balance found to be due the United States The contention was made that the audit-

ing of accounts was a judicial act, that Congress had no constitutional power to provide, that this might be done by an auditor and property might be sold to satisfy any claim found to be due the United States, without submitting the determination of the question of indebtedness to a court.

Answering this contention, Judge Curtiss says:

> "That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act must be admitted. So are all those administrative duties, the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. * * * * But it is not sufficient, to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. It is necessary to go further and show, not only that the adjustment of balances due from accounting officers may be, but from their nature, must be, controversies to which the United States is a party, within the meaning of the second section of the third article of the constitution. We do not doubt the power of Congress to provide by law that such a question shall form the subject matter of a suit, *in which the judicial power can be exerted.* The Act of 1820 makes such a provision for reviewing the decisions of the accounting officers of the Treasury. But until reviewed, it is final and binding; and the question is whether its subject

matter is necessarily, and without regard to the consent of Congress, a judicial controversy. And we are of opinion it is not."

Again, the court says:

"At the same time there can be no doubt that the mere question, whether a Collector of the Customs is indebted to the United States, *may be one of judicial cognizance.* It is competent for the United States to sue any of its debtors in a court of law. It is equally clear that the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just. Though both the marshal and the government are exempt from suit, for anything done by the former in obedience to legal process, still Congress may provide by law, that both, or either, shall, in a particular class of cases, and under such restrictions as they may think proper to impose, come into a court of law or equity, and abide by its determination. The United States may thus place the government upon the same ground which is occupied by private persons who proceed to take extra judicial remedies for their wrongs, and they may do this to such extent, and with such restrictions, as may be thought fit. * * * * * * To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit

> at the common law, or in equity, or admiralty; nor, on the other hand, ***can it bring under the judicial power, a matter which, from its nature, is not a subject for judicial determination.*** At the same time, there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of Congress whether a remedy in the courts shall be allowed at all, in such cases they may regulate it and prescribe such rules of determination as they may think just and needful."

The case of the United States ex rel. Bernardin *v.* Duell, (172 U. S., 573) is directly in point. In an interference proceeding in the patent office between Bernardin and Northall, the commissioner decided in favor of Bernardin, whereupon Northall appealed to the Court of Appeals for the District of Columbia, which court reversed the finding of the commissioner, and awarded the priority to the appellant. Thereupon Bernardin applied to the commissioner to issue him a patent, notwithstanding the judgment of the Court of Appeals. This request was re-

fused and Bernardin applied for a writ of mandamus, to compel the commissioner to issue him a patent in accordance with his decision, on the ground that the statute providing an appeal from the commissioner to the Court of Appeals was unconstitutional, and the judgment of the Court of Appeals was void for want of jurisdiction. The contention was:

> "That Congress had no power to authorize the Court of Appeals to review the action of the commissioner in an interference case, on the theory that the commissioner is an executive officer; that his action in determining which of two claimants is entitled to a patent is purely executive; and that therefore such action cannot be subject to review of a judicial tribunal."

The former decisions of this court are reviewed, and the conclusion reached, that, while Congress cannot bring under the judicial power a matter which in its nature is not a subject for judicial determination, nevertheless, it may remit to the determination of the courts questions that are essentially judicial in character. Referring to the opinion in Butterworth vs. Hoe, (112 U. S., 50) wherein it was held that the action of the courts in determining such matters was conclusive upon all departments of the government, the court says:

"We perceive no ground for overruling that case or dissenting from the reasoning of the opinion; and, as the proceeding in the Court of Appeals on an appeal in an interference controversy, presents all the features of a civil case, a plaintiff, a defendant, and a judge, and deals with a question judicial in its nature, in respect of which the judgment of the court is final so far as the particular action of the Patent Office is concerned, such judgment is none the less a judgment 'Because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the constitution.' (Interstate Commerce Commission vs. Brimson, 154 U. S., 447). * * * * * * The nature of the thing to be done being judicial, Congress had power to provide for judicial interference through a special tribunal, (United States vs. Goe, 155 U. S., 76 (39 : 76)); and a *fortiori* existing courts of competent jurisdiction might be availed of."

The question whether Hill possessed Choctaw blood, and was therefore a member of the Choctaw Tribe of Indians was essentially judicial in character, and such as might be remitted to the courts for judicial determination. When Congress provided that it should be determined by the courts, that body "*disclaimed* the right to treat it as a *political* question, and made it one of purely *judicial* action."

The determination of the question of citizenship in the Choctaw and Chickasaw Tribes of Indians, being, originally, a duty incumbent upon Congress, it had the power to discharge that duty in either one of four ways: First, it could determine it by direct enactment. Second, it could delegate the determination of the question to a commission or a board, or other such agency, and make such determination final. Third, it could delegate the matter to such a board or commission, and require it to be submitted back to Congress for its further action. Fourth, it could refer the matter to the determination of the courts.

Having remitted the matter to the courts it had the right to withdraw this jurisdiction at any time before the action of the courts had become final. Indeed, it is possible that Congress could have required the action of the United States Courts in the Indian Territory to be submitted back to Congress, for confirmation or rejection. Congress could not, however, lawfully impose upon this court the duty of determining such questions, and after its action had become final, either itself reverse, modify or vacate, or authorize any other tribunal to reverse, modify or vacate the decree thus obtained. This court does not sit as an Indian Agent, or a commission; it cannot exer-

cise any functions other than those that are judicial. Its judgments and decrees are impervious to all attacks, whether collateral or direct. As a co-ordinate branch of the government, it is equal in dignity with the legislative. It is not the plaything of Congress, nor may that body impose upon it the determination of matters which may properly be made subjects of judicial cognizance, and then submit its final judgments to further review, if they do not accord with what Congress thinks they should have been. Congress imposed upon this court the duty of determining whether or not the Acts of June 10, 1896, and July 1, 1898, were constitutional. Surely, such a question is a judicial one, and one upon which the powers of this court may act.

It is true that this court was not exercising any of the judicial powers conferred by article three of the constitution. It is well settled, however, that this section of the constitution does not exhaust the power of Congress to establish courts. The fact that Congress derives its power to establish courts in the Territories from portions of the constitution, other than article three, does not, in any measure, exempt it from constitutional restraint, and permit it to exercise unbridled power over the final judgments of courts, thus established.

In our judgment, the cases cited by the Circuit Court of Appeals do not sustain the statement of that court that,

> "The legislative department of the government has ample power, by subsequent enactment, *to grant a new trial*, or a review by suitable tribunal, of judgments final, under the laws in force when they were rendered."

We confess that the legislative department has the right to provide for a review by some suitable judicial tribunal, but we do not concede that the legislative department of the government has the right to *grant a new trial.*

A review of the cases cited may not be unprofitable, and we, therefore, refer to them briefly:

(*a*). In the case of Sam Peyreac vs. United States, (7th Peter, 222) suit was filed in the Superior Court of the Territory of Arkansas, sitting in chancery, to establish the title to a tract of land, claimed to have been granted to the plaintiff by the Spanish Governor of the province of Louisiana. It was claimed in the petition that in October, 1789, the plaintiff addressed a letter to the Spanish Governor, asking for a grant of the land in controversy; and that, on the 11th day of October, the Governor made an order of survey, granting the plaintiff the right to locate

the land in question. The Territorial Court entered a decree, establishing the plaintiff's title to the land in question. About two years thereafter, the United States, under the Act of 1840, filed *in the same court*, a bill of review, alleging that the decree had been obtained by fraud. It was charged that the original petition to the Spanish Governor, and the order of survey issued by him were both forgeries. The plaintiff failed to answer, and a decree, *pro confesso*, was entered as against him. Thereupon, one Joseph Stuart, who claimed title to the land through purchase from one John J. Bowie, asked permission to be made a defendant, and such permission being granted, he claimed that he was an innocent purchaser, having purchased from Bowie, in ignorance of the fraud that had been practiced upon the United States in the original decree.

It was admitted in the argument of the case

> "That the grant under which Sam Peyreac claimed the land was a forgery; and that the deed from him to Bowie was a forgery."

We respectfully suggest that this hardly sustains the view of the Circuit Court of Appeals that

> "After the decree had become final, under existing laws, an innocent purchaser bought the established title."

The Supreme Court specifically repudiated the suggestion that Stuart had purchased the established title of Sam Peyreac, and that his right to the property had thereby become vested, before the passage of the Act, authorizing the filing of the bill of review. The court says:

> "It is found by the decree of the court below, and is admitted at the bar, that Sam Peyreac is a fictitious person. That the petition purported to have been presented by him to Mero, Governor of the province of Louisiana, and the order alleged to have been made thereon, are forgeries. These are the only evidences of title upon which the original tract rested, and it is proved and admitted that the deed purporting to have been given by Sam Peyreac to Bowie, under whom Stuart claims, is also a forgery. * * * * * If Sam Peyreac was a real person, and appeared here, setting up these objections, it might present a different question."

The decision is not based upon the ground, that, the legislative department of the government has the right to grant a new trial, but is based upon the double proposition, First; that the deed under which Stuart claimed, being a forgery, he failed to connect himself with Sam Peyreac, and Second, that Sam Peyreac, being a fictitious person, "the original decree in this case was a mere nullity; it gave no right to any one." The bill of review in

the Sam Peyreac case was filed *in the sane court* that rendered the original decree, and was based upon admitted fraud. It was but a continuation of the same proceeding. It was the exercise of a jurisdiction claimed by courts of equity from time immemorial, and was in the due course of orderly judicial procedure. The legislation that authorized this bill of review was far different from the legislation in the present case, which authorized a special tribunal, not capable of exercising judicial functions, to annul the decrees of the Supreme Court.

(*b*). In the case of Freeborn vs. Smith, (2 Wallace, 160) the plaintiff had recovered judgment in the District Court of the Territory of Nevada, which on appeal, was affirmed by the Supreme Court of the Territory. The case was brought to this court on writ of error. While pending here, the Territory of Nevada was admitted to the Union as a State. The act of admission, under the decisions of this court, abolished the Territorial Court in which the judgment was rendered. There being no court in existence to which the mandate of this court could go, its jurisdiction to further hear the writ of error would have abated. While the cause was still pending in this court, Congress, on the 27th day of February, 1865, passed an Act,

which provided that all appeals or writs of error from the Supreme Court of the Territory of Nevada might be proceeded with by this court, and its mandate issued to the Supreme Court of the State of Nevada. It was contended that this Act was unconstitutional, because its effect was to disturb the judgment which had become final before its passage. This court held, that at the very moment the Territory of Nevada became a State, all the Territorial Courts were abolished. That the case in which judgment had been rendered, and which was then pending on writ of error, was suspended, without power upon the part of this court to proceed with the writ of error, or, upon the part of the trial court, to enforce the judgment; and that the parties were left to renew their litigation in the State tribunals. The plaintiff, who had recovered below, being thus deprived of his original judgment, and the defendant of the right to proceed with his writ of error, this court very properly held that Congress had the right to provide a remedy by which the same case might be proceeded with to final determination in the same court in which the writ of error was then pending.

(c). In Garrison vs. New York, (21 Wallace, 196) under an Act of the New York legislature, commis-

sioners were appointed by the Supreme Court to assess the damages sustained by parties, resulting from the straightening of Broadway, in New York City. Among other awards, the damages of Garrison were estimated at $40,000, and this report was confirmed by order of the Supreme Court in December, 1870. Two months after the order of confirmation, the legislature passed an Act, which, besides granting the right of appeal, authorized either the city or other parties interested, to make a motion before the Supreme Court or any Justice of the same, to vacate the order of confirmation, because of fraud or irregularities, etc. Under this act, on proper motion, the Supreme Court vacated its order of confirmation, upon the ground that in the award of damages, there had been

> "Error, mistake, irregularity and illegal acts in the proceedings, and that the assessment for benefit and award for damages had been unfair, unjust, inequitable and oppressive."

Thereafter, the plaintiff brought suit to recover the $40,000 award, claiming that the Act of the legislature, which authorized the Supreme Court to vacate its order of confirmation, was unconstitutional, in that it impaired the obligation of a contract, and that plaintiff's right to the

$40,000 award had become vested, and could not be disturbed.

With reference to the first contention, this court held that the judgment was not a contract within the meaning of the constitutional prohibition. With reference to the contention of plaintiff that his right to the amount of the award had become vested, and therefore the Act of the legislature was unconstitutional, this court held that the decision of the Court of Appeals of the State of New York, holding that the Act infringed no provision of the State constitution, was binding upon it. It is pertinent to state just here that in this case, the proceeding for vacating the order of confirmation was instituted in the same court that entered the order, and was a part of the same suit. Besides, the award for $40,000 was not such an unconditional judgment as to support the plaintiff's claim that his interest therein was a vested right. The plaintiff could not successfully claim that his right to the judgment was vested, until the title to the property in controversy had vested in the city.

The authorities in this country, including the decisions of this court, are almost uniform, to the effect that in condemnation proceedings, title to property does not pass

until the compensation has all been actually paid, or suitable provision for its payment secured. Indeed, the authorities are, that the condemning party, at any time before title has passed to it, may abandon the condemnation proceedings. It is clear, that the City of New York, instead of availing itself of the right to seek, in the Supreme Court, a vacation of its order of confirmation, might have abandoned further proceedings, in which event, the title to the property would have remained in the plaintiff and his inchoate right to the award would thus have been destroyed.

(*d*). In the case of Freeland vs. Williams (131 U. S. 405) Freeland brought suit in the Circuit Court of Preston county, West Virginia, against Williams for the taking and conversion of certain cattle, the property of the plaintiff. He recovered judgment, which was affirmed by the Supreme Court of that state. Subsequently, in 1872, the Constitution of the state was amended so as to provide:

> "No property shall be seized or sold under final process issued upon judgments or decrees heretofore rendered, or otherwise, because of any act issued according to the usages of civilized warfare by either of the parties thereto. The legislature shall provide by general law for giving full force and effect to this section, by due process of law."

The legislature sought to discharge the duties thus imposed upon it, and by the law thus enacted Williams obtained a new trial in the court that rendered the judgment. On appeal from the order granting a new trial, the lower court was reversed and the proceeding to set aside the judgment was dismissed. The Supreme Court held that the method prescribed by the legislature to secure a new trial was not due process of law, and was, therefore, not constitutional. Thereupon Williams sought to enjoin the enforcement of the judgment by bill in equity, filed in the court in which the judgment was rendered. Freeland contended that the Constitution of West Virginia was in conflict with the Constitution of the United States; first, because it impaired the obligation of a contract, and second, because it deprived him of property without due process of law. The first of these contentions was adversely determined, but the reasons assigned are not material to the discussion of this case.

In the disposition of the second contention, this court found itself confronted with a more serious question. The original action was a simple case of trespass for the wrongful seizure and conversion of cattle. In the second action, in which it was sought to restrain the collection

of the judgment, it appeared that the cattle were taken by Williams under an order of Gen. Fitzhugh Lee, and in the exercise of belligerent rights. This court held that the original judgment on its face was *prima facie* valid, but, that, since it appeared from the facts proven on the second trial that it was founded upon an act done in the exercise of belligerent rights, it was voidable, and that the procedure through which it was enjoined was one of the recognized processes of law for re-examining matters on which a judgment is founded, and was, therefore, due process of law.

> "Judgments, however solemn, however high the court which rendered them, and however conclusive in a general way between the parties, may be subject to review, to reconsideration, to reversal, and to modification by various modes. Among these are motions for new trials, appeals, writs of error, and bills of review. * * * * Undoubtedly the mode pursued in this case of obtaining relief from the judgment of the Circuit Court of Preston county is in its form due process of law. It is by an appeal to the courts, in their regular course of procedure, and is not by any summary or unusual process applied to the determination of the rights of parties."

It is worthy of consideration that in this case the action to enjoin the judgment was in the *same* court in which

it was rendered. In the case at bar the action was in a special court of limited jurisdiction. The action was neither to review, to reconsider, to reverse, to modify nor to enjoin, but to nullify, and the procedure was *summary* and *unusual*. Indeed, so far as our observation goes, the Citizenship Court has not its like in all the history of American legislation.

(*g*). The case of Grisar vs. McDowell, (6 Wall., 363) was a controversy over a tract of land between Grisar and an officer in the army of the United States, who held the property under an order of the Secretary of War. The land was located in the City of San Francisco, and, on December 31, 1851, was, by order of the President, reserved from sale and set apart for public purposes.

The land in controversy was a portion of four square leagues, to which the City of San Francisco claimed title, as successor of a Mexican Pueblo, and which was granted to plaintiff by an ordinance of the city, on the 20th of June, 1855. The question before this court was, whether the United States or the City of San Francisco possessed any title to the land in controversy on the first day of January, 1855.

It was admitted that the city possessed such title as had been held by the Mexican Pueblo. Under

the Mexican law, towns, when once officially recognized, were entitled, for their benefit and that of their inhabitants, to land not to exceed four square leagues, which should be assigned to such Pueblo, upon its original establishment, or, afterwards, upon petition of its officers or inhabitants.

Until the lands were surveyed and assigned to the Pueblo, the right or claim was an imperfect one. It was a right which the government could refuse to recognize at all, or which it might recognize, burdened with such conditions as it saw proper to impose. "Even after the assignment, the interest acquired by the Pueblo was far from being an indefeasible grant, such as is known to our laws. The interest acquired amounted to little more than a qualified right to alienate portions of the land to its inhabitants for building or cultivation, or for public purposes. Even this limited right in disposition and use was in all particulars subject to the control of the government."

In the case under consideration, no assignment of the land had ever been made to the pueblo. This government succeeded to the rights of the Mexican government, and the claim of San Francisco to the land in question was, therefore, subject absolutely to such legislation as

Congress might enact. The plaintiff took possession, and was living on the land, when he was ousted by the defendant. In July, 1852, the city presented her claim to the four leagues of land to the Board of Land Commissioners, created under the act of March 3, 1851, and, in December, 1854, the board rendered its decision, confirming the city's claim as to a portion of the land (embracing the premises under consideration) and rejecting its claim as to the residue. An appeal was taken by both parties to the District Court. In February, 1857, the appeal on the part of the United States was withdrawn, and the city was offered leave to have the decree of the Board of Commissioners made the final decree of the District Court. She declined to accept this offer, however, but continued to prosecute her appeal for the residue of her claim to the four leagues, which, of course, kept the whole proceedings open. The case was still pending in the District Court when, on the first of July, 1864, Congress passed an act under which the case was transferred to the Circuit Court of the United States. That court on the 18th of May, 1865, confirmed the city's claim to the four square leagues, subject to certain exceptions, among which was such portions of land as

had been previously "reserved or dedicated to public uses by the United States." An appeal was taken from the decree of the Circuit Court to the Supreme Court, and while there pending, on the 8th day of March, 1866, Congress passed an act by which it granted to the city of San Francisco all the lands situated in the city limits, "subject, however, to the exceptions and reservations in the decree" of the Circuit Court.

On the trial of the case, the defendant sought to introduce the decree of the Circuit Court, as thus modified and confirmed by the Act of Congress. It was objected to, the plaintiff contending that when the United States in the District Court, withdrew its appeal from the Board of Commissioners, the controversy as between the United States and the City was closed; and second, that the appeal to the Supreme Court suspended the operation of the decree of the Circuit Court and took from it all efficacy, as evidence of title. With reference to the first contention, this court says:

> "In 1857, the Attorney General withdrew the appeal on the part of the United States, and in March following, the District Court, upon the stipulation of the District Attorney, ordered that appeal to be dismissed, and granted leave to the city to proceed

upon the decree of the board as upon a final decree. The counsel of the plaintiff contended that this decree closed the controversy between the city and the United States as to the land to which the claim was filed, but in this view they are mistaken. *Had the city accepted the leave granted, withdrawn her appeal, and proceeded under the decree, as final, such a result would have followed.* But this course she declined to take. She continued the appeal for the residue of her claim to the four square leagues. This kept open the whole issue with the United States."

In disposing of the second contention, this court used language that has evidently been misconstrued. Referring to the decree of the Circuit Court, this court says:

"But there is another and conclusive answer to the objection to the admissibility of the decree. By the action of Congress it had become, with some modifications, final. On the 8th day of March, 1866, which was previous to the trial of this action, Congress passed an act to quiet the title to certain lands within the corporate limits of the City of San Francisco. By this act, all the right and title of the United States to the land situated within the corporate limits of San Francisco confirmed to the city by the decree of the Circuit Court, were relinquished and granted to the city, and the claim of the city was confirmed, subject, however, to the reservations and exceptions designated in the decree, and upon

the trust that all the land, not previously granted to the city, should be disposed of and conveyed by the city, to parties in the *bona-fide* actual possession thereof. * * * * * * In the execution of its treaty obligation with respect to property claimed under the Mexican laws, the government may adopt such modes of procedure as it may deem expedient. It may act by legislation, directly upon the claims preferred, or it may provide a special forum for their determination, or it may require their submission to the ordinary tribunals. It is the sole judge of the propriety of the mode, and having the plenary power of confirmation, it may annex any condition to the confirmation of a claim arising upon an imperfect right which it may choose. It may declare the action of the special board final; it may make it subject to appeal; it may require the appeal to go through one or more courts, and it may arrest (not reverse) the action of the board or courts at any stage. The act of March 3, 1851, is a general act, applying to all cases, but the act of March 8, 1866, referring specially to the confirmation of the claim to lands in San Francisco, withdrew that claim as it then stood, from the further consideration of the courts, under the provisions of the general act. It disposed of the city's claim, and determined the conditions upon which it should be recognized and confirmed. The title of the city, therefore, rested upon the decree of the Circuit Court, as modified by the act of Congress."

By this act Congress did not undertake to *reverse* the decree of the Circuit Court, but simply withdrew it from further consideration by the courts. That is, it practically repealed the law allowing an appeal to the Supreme Court, and left the decree of the Circuit Court, as it were, in midair. However, Congress made the decree of the Circuit Court the *basis* of its act granting the lands to the city. The validity of the city's title did not rest upon the decree of the Circuit Court as a *decree*, but upon the *act of Congress*, which took the decree, modified it in some particulars, and made it the *legislative act*. The vitalizing force was not in the decree of the Circuit Court, but in the act of Congress. If, when the decree of the Circuit Court was rendered, its action had been final, it is respectfully submitted that Congress could not have modified or reversed it. The plaintiff had only such title as the city had. This title was confessedly an imperfect one. Congress had the right to determine for itself, in the first instance, whether the title remained in the United States or in the city. Likewise, it had the right to remit the determination of this question to the courts. It chose the latter course. While the cause was pending in the courts, and the question of

title was still in controversy, Congress chose to withdraw jurisdiction from the courts, to resume its original power, and to determine the matter for itself. If, before the passage of the act of March 8, 1866, the appeal had been finally determined in the Supreme Court, another question would have been presented. We submit that in the latter state of case, Congress would have found itself powerless to pass any act in derogation of the title thus established. The distinction is a plain one. Congress has the power, at any time *before* the action of the courts has become final, to resume its original plenary power. *After* the litigation has become final, however, it has passed beyond the control of Congress. In other words, Congress had the right to arrest the jurisdiction of this court before it had finally acted. It does not, however, possess the power, after the court has finally acted, to undo its work. This would be an encroachment upon the judiciary, that the courts will not tolerate. The cases of Hosmer vs. Wall, 97 U. S. 575, and Trenouth vs. San Francisco, 100 U. S. 251, grew out of Mexican land grants, and are in keeping with the doctrine announced in Grisar vs. McDowell.

(*h*). There is nothing in the opinion in La Abra Silver

Mining Company vs. United States, (175 U. S., 423) that operates against the contention we make. That case should be read in connection with Frelinghuysen vs. United States, (110 U. S,, 63) both of which are discussions of rights claimed by certain citizens of the United States, growing out of the convention between the United States and Mexico, entered into on the 4th day of July, 1868. This convention provided for the appointment of a commission to adjust all claims arising on the part of citizens of the United States against the Republic of Mexico, and all claims arising on the part of citizens of Mexico against the United States. It provided that the finding of said commission should be absolute and final between the two governments, that the total amount of claims awarded one government, should be set off against the total amount awarded the other, and that the difference should be paid in instalments of $300,000 to the government in whose favor the larger amount was awarded. It developed that the balance was largely in favor of the United States. The convention provided that the claims "should be heard upon such evidence and information only as should be furnished by or on behalf of the respective governments."

The La Abra Mining Company presented its claim for something less than $2,000,000, which grew, by different amendments, to practically $4,000,000. The government of the United States was awarded, on account of this claim, $683,000. After different payments had been made, the president called the attention of Congress to the fact that grave doubts existed as to whether or not the United States had, through the fraud of the claimant, been made the means of enforcing a fraudulent claim against the Republic of Mexico. On the 28th of December, 1892, Congress enacted that the Attorney General, in the name of the United States, should institute suit in the Court of Claims against the La Abra Silver Mining Company, for the purpose of determining whether or not the award had been procured through fraud and false practices. The Act provided that either party might take an appeal to the Supreme Court within thirty days from the final decree of the Court of Claims. The decree of the Court of Claims recited that the award of the La Abra Mining Company

> "Was obtained as to the whole sum included therein, by fraud, effectuated by means of false swearing and of false and fraudulent practices on the part of said Company and its agents, and adjudged that

the claim of said Company, both in law and equity, should be forever barred and foreclosed."

Among other contentions not material to a consideration of this case, the defendant contended that the Act of Congress was unconstitutional, because the action of the commission was final and conclusive; that the award made on account of the claim of the defendant, was defendant's property; that such award could not be set aside, reopened or vacated by a municipal court, and that its action was *res judicata*. Of course, this contention was not sustained. Justice Harlan, in delivering the opinion of the court, says:

"The money in the hands of the Secretary of State was paid to the United States by Mexico pursuant to the award of the commission. That tribunal dealt only with the two governments, had no relations with claimants, and could take cognizance only of claims presented by or through the respective governments. No claimant, individual or corporate, was entitled to present any demand or proofs directly to the commission. No evidence could be considered except such as was furnished by or on behalf of the respective governments. While the claims of individual citizens presented by their respective governments were to be considered by the commission in determining amounts, the whole purpose of the convention was to ascertain how much was due from one government to

> the other on account of the demands of their respective citizens. * * * * * As between the United States and Mexico, indeed as between the United States and American claimants, the money received from Mexico under the award of the commission was in strict law the property of the United States, and no claimant could assert or enforce any interest in it so long as the government legally withheld it from distribution."

It is made clear from this opinion, that the citizens of the United States were not parties to the award. The matters tried by the commission were questions solely between the two governments. As between these governments, the award was final and conclusive. The United States had the right, under the convention, to insist that the award was conclusive as against the Mexican government. It likewise had the right to waive the binding effect of this award, and agree that the matter might be retried.

> "Undoubtedly Congress, having in view the honor of the government and the relations of this country with Mexico, could have determined the whole question of fraud for itself, and by a statute approved by the president, or which, being disapproved by him, was passed by the requisite constitutional vote, have directed the return to Mexico, the other party to the award, of such moneys as had been paid into the hands of the Secretary of State."

Instead of exercising this power itself, Congress had the right to remit the determination of the whole question to its municipal courts, and this course it pursued. Having remitted it to the courts, Congress had the right, under its plenary power, at any time before the action of the courts became final, to withdraw it from their further consideration and resume its original authority. After the matter, however passed to final judgment in the courts, we submit that it was beyond the reach of Congress. To illustrate: Suppose that the Court of Claims had decided that the La Abra company's claim was free from fraud, and granted judgment in its favor. Suppose, further, that on appeal to the Supreme Court this decree had been affirmed. We submit that, in such event, the matter would have become *res judicata*. The company's claim to the amount of judgment would have become vested. Will it be contended that, after such affirmance on the part of this court, Congress could have lawfully created another subordinate tribunal and authorized it to set aside such judgment? We submit that the judgments and decrees of this court, though based upon matters over which Congress originally might have exercised plenary power, are beyond the constitutional reach of Congress.

(*i*) The case of Emblen vs. Lincoln Land Company, 102 Fed. Rep. 559, is in line with the decisions we have been examining. This was an action brought by Emblen against Weed, the purpose of which was to divest out of the defendant the title to certain lands to which he had received a patent from the United States, and to vest the title in the plaintiff. The act of May 14, 1880, (21 Stat. 140) provided that: "In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption homestead, or timber culture entry, he shall be notified by the register of the land office, of the district in which such land is situated, of such cancellation, and shall be allowed thirty days from the date of such notice to enter said land." It appeared that the defendant had made a cash pre-emption entry of the land in controversy on September 19, 1885. On October 4, 1888, Emblen entered a contest, upon the ground that defendant had not complied with the requirements of the law with respect to residence, etc. The contest was dismissed, and on appeal to the Commissioner of the General Land Office, and from there to the Secretary of the Interior, John W. Noble, the action in dismissing the contest was affirmed. Subse-

quently Secretary Smith, who had succeeded Secretary Noble, ordered a rehearing of the whole controversy before the local officers. While the case was pending upon the order for rehearing, on December 29, 1894, Congress passed a law granting the land in controversy to the contestee Weed. In his bill the plaintiff contended that he paid the preliminary fee for filing the contest, and had a vested interest in the land, and that the act of Congress in attempting to convey it to another was unconstitutional. The court held, that Emblen's right to enter the land was based upon the condition that he first procure a cancellation of the defendant's entry. Not only had he failed to procure this, but his effort to secure such cancellation had been decided against him, and this decision had been affirmed by the Secretary of the Interior. It is true Secretary Noble's successor, Secretary Smith, attempted to grant a rehearing. This action, however, of Secretary Smith in attempting to revoke the order of his predecessor in office, was, under the decisions of this court void. In Noble vs. Railroad Company, 147 U. S. 165, this court had said :

> "A revocation of the approval of the Secretary of the Interior, however, by his successor in office,

> was an attempt to deprive the plaintiff of its property without due process of law, and was therefore void."

"As was said by Mr. Justice Greer, in U. S. vs. Store, 2d Wall, 525:

> "One officer in the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court."

It thus appeared not only that Emblen had failed to secure the cancellation of Weed's entry, but that his effort to procure such cancellation had been conclusively determined against him. Of course, in this state of case, the court could render no other judgment, than to dismiss his bill.

SEVENTH.

The proceedings in the Citizenship Court, whereby it undertook to vacate the decrees of the United States Courts, were not due process of law. The term "Due Process of Law" is incapable of accurate definition. It is not doubted that Congress may adopt new remedies and change existing methods of procedure, provided it does not violate fundamental principles. Discussing the meaning of the term in Den vs. Hoboken, (*supra*) Mr. Justice Curtis says:

"The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will. To what principle, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be two-fold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

This is perhaps as good a definition as can be given. Tested by it, the proceedings in the Citizenship Court fall far short of its requirements. That court, being one of limited jurisdiction, the ordinary rule which, in courts of general jurisdiction upholds their proceedings by the presumption of regularity, does not obtain. It could act

only in strict compliance with the statute creating it. (Galpin vs. Page, 18 Wall., 350). It was not given a free hand to determine the questions submitted to its jurisdiction, without reference to precedent. Sec. 33 of the act provides,

> "Except where herein otherwise expressly provided, the pleadings, practice and *proceedings* in said court shall conform, as near as may be, to the pleadings, practice and proceedings in equity causes in the Circuit Court of the United States."

No appeal was given from its decision, and therefore Congress hedged its jurisdiction with the proviso that it must be governed by the procedure that obtained in the Circuit Courts. The very moment it went beyond the power thus conferred, it acted without authority of law and its proceedings were unlawful. It is important, therefore, to inquire, whether the two questions submitted to the Citizenship Court, would have authorized the Circuit Court of the United States to vacate decrees admitting parties to citizenship. The jurisdiction of courts of equity to entertain bills to vacate the judgments of other courts, is well defined. The question has oftentimes been considered by this court, and the meat of all its decisions is contained in the statement of Justice Harlan, in Marshall vs. Holmes, (141 U. S., 589) where he says:

> "Any act which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

The decisions of the Federal Courts will be searched in vain for a case which holds that one court may vacate the judgment or decree of another court, unless, for some one of the reasons contained in the foregoing statement. Errors and irregularities in procuring a judgment or decree have never been held sufficient to vest another court with jurisdiction to vacate such judgment or decree. If it should be confessed that the United States Courts in the Territory should have served notice of the proceedings therein upon both Tribes, and that it should have confined its hearings to a review of the proceedings before the Dawes Commission, the most that could be claimed would be that those were simply errors of those courts, such as could be corrected by bill of review or other appropriate proceedings in the courts rendering them.

We believe we may confidently state that there is not a single authority in all the books that would authorize a

court of equity to vacate these decrees, because of the alleged errors.

The term "procedure" is a word of comprehensive meaning, (Kring vs. Mo., 107 U. S., 231).

The Citizenship Court was bound, under the law, to follow the procedure that would have obtained in the Circuit Court of the United States, sitting as a court of equity, under a similar state of facts. No Circuit Court would, for a moment, have entertained jurisdiction to vacate the decrees of the United States Courts in the Indian Territory upon such questions as were submitted to the Citizenship Court. Are we not, therefore, justified in stating, that it could have no jurisdiction to proceed, other than as a Circuit Court would have proceeded, and that its attempt to vacate the decrees of the Territorial courts was without jurisdiction, and void? There is no contention that the parties recovering these decrees were in any manner at fault. They followed literally the procedure mapped out for them by the Dawes Commission and by the courts wherein the decrees were rendered. There is no charge that they were guilty of misconduct or fraud. There is no charge that the Tribes were not permitted in the proceedings that resulted in these decrees, to urge as defenses,

the very questions that were submitted to the Citizenship Court. In the case of Freelan vs. Williams, (*supra*) where it was found that the acts upon which the judgment was based, were done in accordance with the usages of civilized war, Justice Miller makes this statement:

> "If it be true that, when the original action was presented to the Circuit Court of Preston county, the thing complained of was found to be an act in accordance with the usages of civilized war, during the existence of a war flagrant in that part of the country, that court should have proceeded no further, and its subsequent proceedings *may be held to have been without authority of law.*"

The Citizenship Court must be presumed to have known the law, and the very moment it appeared to that body that the questions submitted to it were not sufficient to authorize the Circuit Court of the United States to vacate decrees, under similar circumstances, it was its duty to dismiss the bill. It had no anthority or jurisdiction to proceed further, and its subsequent acts were void.

EIGHTH.

At the date of the passage of the act that created the Citizenship Court, July 1, 1902, Hill was in possession of the land in controversy. It had been more than four

years since the decree of the United States Court admitting him to citizenship. The lands of the Choctaw and Chickasaw Nations had been surveyed prior to the rendition of this decree. He had taken possession of this land, designating it as his allotment. During the time intervening between the date of his decree and the act creating the Citizenship Court, he was conceded to be a member of the Choctaw Tribe of Indians, and enjoyed all the rights and privileges of other members of the Tribe.

In the opinion of the Circuit Court of Appeals, it is held:

> "The judgments of citizenship rendered by the courts were conclusive upon the parties to them, in the absence of subsequent legislation; but, though final when rendered, they were voidable and reviewable by subsequent act of Congress passed before allotments of land were made them."

In view of this statement, it becomes important to determine the character of Hill's title, and when title acquired under the act of June 28, 1898, vested. That Hill had some kind of title to this land is beyond dispute. That this title would have been an indefeasible title in fee simple, if the Dawes Commission had discharged the minis-

terial duty that was imposed upon it of ratifying Hill's selection of his allotment, is equally clear. At the time the land was selected by Hill, he was, admittedly, a member of the Tribe. It being confessed that he was the owner of valuable improvements upon the land in question, it is clear that he had the right to make the selection. The facts being conceded, there was no matter of discretion left to the Dawes Commission. The authorities upon this question are too uniform to admit of doubt. Hill had done everything incumbent upon him to perfect his title. The act of June 10, 1896, required the Dawes Commission to place his name upon the roll of citizenship within six months, and to make him an allotment. He presented to that commission the decree admitting him to citizenship, asked enrollment, and requested the commission to set apart this land as his allotment. Can it be that, because the Dawes Commission, for more than four years, failed in the discharge of its duty, Hill's title to the land is to be defeated, when he had discharged every duty incumbent upon him to perfect that title? The case of Little vs. The State of Arkansas, 9 How. 314, is directly in point. Little, in an effort to perfect a homestead entry, had done everything incumbent upon him. Through the fault of

the officers of the government, he had not acquired the legal title. It was held, however, that he was not to suffer, because of the neglect of the officers of the government. Justice McLean says:

> "It is a well established principle that when an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of the public officers, the law will protect him."

The act of June 28, 1898, provides:

> "That all the lands within the Indian Territory, belonging to the Choctaw and Chickasaw Indians, shall be allotted to the members of said tribes, so as to give *each member* of said tribes, so far as possible, a fair and equal share thereof, considering the character and fertility of the soil, and the location and value of the land."

What was the character of title conferred by this act? What is the character of title taken by members of the tribes, who procure their allotments under this act, and when does title vest in the allottee? At the date we are writing, practically all the members of the Choctaw and Chickasaw Tribes, whose rights to membership are not in dispute, have received their allotments. In many instances, the selections made by allottees have simply been ratified by the Dawes Commission. In many cases,

allotment certificates have been issued to the allottees, showing that parties are entitled to patents; while in a large number of cases patents have been executed by the Governors of the Choctaw and Chickasaw Nations, conveying the legal title to the allottees.

When does the allotment take place, so as to vest in the allottee title to the lands? Is the allotment made when the patent issues, or is it made when the Dawes Commission approves the act of a member of the tribe, in designating a particular tract of land as his allotment; or, did title vest at the date of the passage of the Curtis act? What is it that confers title upon the allottee? The title to these lands was never in the governors of the tribes, and, therefore, the patents that these two officers execute do not convey title. They are only an evidence that title has already passed. The Dawes Commission does not convey title, to allottees, because no title ever existed in that body. It has often been held by this court, that the legal title to these lands rested in the Indian governments, who held it in trust for the members of the tribes. The act of June 28, 1898, which provided for the allotment of lands, was ratified by the two Indian tribes. *It was that act that gave title.* It

can not be doubted that the title of those allottees who have received patents, takes effect by relation, as of the date of that act. Any other construction will lead to bewildering perplexities. Prior to the allotting act, the naked title to these lands was in the tribes. The *beneficial* title, however, the *actual ownership*, was in the members of the tribes, and they held, practically, as tenants in common.

> "At law, the trustee, as the holder of the legal title is the absolute proprietor of the estate, and he may exercise such powers as are conferred by legal ownership; but in equity, the *cestui que trust* is the *absolute owner*, and, in consequence, the trustee can deal with the estate only in such a manner as a court of equity will sustain." (Beech on Trust and Trustees, sec. 428).

As just stated, prior to the allotting Act, the interests held by the different members of these Tribes was a common one. When did this common holding cease? "Allotment is a setting apart and apportioning of the property formerly held by joint owners, so that each one may hold in severalty his own specific share." (Amer. and Eng. Enc. of Law, 2 ed., 151; Glenn & Glenn, 41 Ala., 577).

The allotting act converted the tribal property into individual property. Property that had theretofore been held

in common, was thereafter held in severalty. The fact, that each member of the Tribes had not made his individual selection, does not affect the question that *common ownership* had been destroyed, and *individual ownership* substituted. Necessarily, that is the only construction that can avoid utter confusion.

The Act of 1898 either *destroyed* the *community* of property theretofore existing among the members of the Tribes, or continued it as to *all* the members. Either, title to all members was conferred by that Act, or else no members' title can be completed until all the land is allotted. If A, B and C have a joint ownership in property, the very moment that the property is so apportioned as to vest in A title to any particular portion of the land, is title as to the other property necessarily ceases. No Indian who has received fee simple title to his allotment by issuance of patent or otherwise, can claim common ownership to the remaining portion of the Indian lands; and yet, this must result, unless it be admitted that the allotting Act itself converted common holdings into individual ownership; and, indeed, this is in accordance with the uniform holdings of this court.

The question of the effect of a treaty between the government and an Indian Tribe, providing for the allotment

of lands among the members of the Tribe, has been before the Supreme Court many times. It has, in every case, been held that the treaty converts the tribal property into *individual* property, and that the members of the tribe take, at the date of the treaty, a fee simple title to their share of the land, which title becomes definite and fixed as soon as the land is located.

This doctrine, first announced in the case of United States vs. Brooks, et al. 10 Howard, 442, has been consistently maintained in Doe vs. Wilson, 23 Howard, 457, Grews vs. Burcham, 66 U. S. 1 Black, 353, Best vs. Doe 10 Wall, 112, New York Indians vs. United States, 170 U. S. 1, and finally reaffirmed in Jones vs. Mehan, 175 U. S. 1.

It would extend this brief beyond the limits of moderation to examine, in detail, each of these cases. The case last cited is a luminous review of all the former decisions.

It construed a treaty between the United States and the Chippewa Indians, by the terms of which the Indians ceded to the United States certain lands in the State of Minnesota. The treaty provided for the allotment of 160 acres of land to each male adult, which was to be selected by the allottee. A reservation of 640 acres near the

mouth of the Thief river for the Chief Monsimoh was made in the treaty. The chief took possession of 640 acres of land near the mouth of Thief river, but died before the land was surveyed or allotted to him. After his death, his oldest son succeeded him as Chief of the Tribe, and a patent was issued by the Federal Government to the heirs of the elder Monsimoh. Under the law, all the title of the elder Monsimoh descended to the eldest son, who, in 1891, entered into a lease with the plaintiff for a portion of the land for a period of ten years, at an annual rent of $25. After the land was surveyed, young Monsimoh, treating the first lease as void, made a lease to the defendant for a term of twenty years, at an annual rent of $200. On August 4, 1894, Congress, treating the lease to the plaintiff as void, passed an act authorizing the Secretary of the Interior to approve the second lease, if he deemed it advisable, and upon such terms as he might impose. Thereupon the secretary approved the second lease, upon the condition that the annual rental should be $400. This was accepted by the defendant. The suit was a bill in equity, filed by the plaintiff, seeking to quiet his title to the land in controversy for the term of his lease—ten years. The Circuit Court held that the res-

ervation in the treaty to the elder Monsimoh, was in the nature of a grant of title to him, burdened with no restrictions or conditions, save that of selection and identification; that upon the selection and location, title in the land vested in the younger Monsimoh, as his eldest son and successor. That the latter's lease of November, 1891, to the plaintiff was a valid and substantial lease of the land in controversy, and needed no approval from the Secretary of the Interior. Mr. Justice Gray, in delivering the opinion of the Court, says: "The fundamental question in the case is, what was the nature of the title which the elder Chief Monsimoh took under the treaty of October 2, 1863, between the United States and the Red Lake and Pembina bands of Chippewa Indians. Was it a landed right of occupancy, with no power to convey the land except to the United States or by their consent? Or was it substantially a title in fee simple, with full power of alienation."

After analyzing the cases heretofore cited, the court continued: "The clear result of this series of decisions is that when the United States, in a treaty with an Indian Tribe, and as part of the consideration for the cession by the Tribe of a tract of country to the United States, makes

a reservation to a chief or other member of the Tribe, of a specific number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple." (Rutherford vs. Green's Heirs, 2 Wheat., 196; Hy-Yu-Tse-Mil-Kin vs. Smith, 194 U. S., 401).

Are we not justified in contending that the defendant took a vested interest to the land in controversy, and that this interest could not be divested, without compensation?

What is a vested right?

> "An estate is vested, when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment." (4 Kent's Com., 202).

Mr. Justice Cooley says:

> "Rights are vested in contradistinction to being expectant or contingent. *They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons, as a present interest.*"

Under these definitions, had not the defendant taken a vested interest in this land? He was a member of the

Choctaw Tribe of Indians; the Curtiss Act provided that he had the right to take his allotment where he owned improvements. He made his selection of the lands in controversy, and nothing remained to confer upon him the full legal title, except the issuing of a patent. Is not his case fully embraced within the definition that Kent gives of a vested right?

We call the court's attention to the case of Fletcher vs. Peck, (6 Cranch, 87). In this case, under the Act of the Legislature of Georgia, the governor granted certain lands to Gunn and his associates. A subsequent legislature repealed this act, upon the ground that the passage of the law had been secured through bribery. The grant had become effective, however, between the dates of the passage of the two acts, and the grantee had conveyed to innocent parties, portions of the land embraced in the original grant.

Chief Justice Marshall, in answering the contention, that the power of one legislature to repeal an act of a former legislature could not be abridged, says:

> "The correctness of this principle, so far as respects general legislation cannot be controverted, *but if an act be done under a law, a succeeding legislature cannot undo it.* The past can-

not be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates, and, if those estates may be seized, by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights."

The decree of the United States Court, which the Act of Congress said should be final, assured the defendant that he was a member of the Choctaw Tribe of Indians. Acting upon the faith of this decree, he reduced the land in controversy to his possession, and expended thereon $1000. Being the owner of these improvements, the Curtis Act assured him, in the most solemn manner, that he might take his allotment upon this particular land. Believing in the integrity of the decree of the United States Court, and the integrity of Congress, he placed other improvements upon said land. He not only had a present right to the enjoyment of the land, but was actually enjoying the same. Beyond question, he was clothed with the equitable title to this property. Nothing remained to clothe him with the full legal title, except the discharge of a ministerial duty at the hands of the Dawes Commission.

Chief Justice Fuller, in his closing remarks in the

Stephens case, referring to the Act of June 28, 1898, uses the following significant language:

> "For reasons already given, we regard this act in general as not obnoxious to constitutional objection, but in so holding we do not intend to intimate any opinion as *to the effect that changes made thereby, or by the agreements referred to, may have, if any on the status of the several applicants, who are parties to these appeals.*"

Undoubtedly the Chief Justice had in mind the various decisions we have just cited, which sustain our contention, that the Curtis Act converted the Indian lands into private holdings, and vested the various members of the Tribe with title to their respective allotments. The language can mean nothing else.

The opinion in the Stephens case contains the following statement:

> "It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely, and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former."

It is not clear to what portion of the act in question this language refers. That act provides that the lands

"Belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said Tribes so as to give *each member* of said tribes, so far as possible, a fair and equal share thereof."

It would seem that this statement in the opinion was an inadvertance, and that the allotting act contemplated that membership in either one of the tribes should carry with it the right to participate in the lands of the tribes. However this may be, the statement must be taken in connection with the question before the court. The court in that case was determining the *constitutionality* and not the *effect* of the allotting act.

In the concluding portion of the opinion heretofore referred to, the court expressly pretermits any opinion as to the ultimate effect of this Act. In that case the vital question, so far as the contentions of those who had procured decrees of citizenship were concerned, was, whether or not the Act of July 1, 1898, providing for an appeal to this court was constitutional. The right which was there claimed to be vested was *only the exemption of those decrees from review*. This is clearly shown by the following statement from the opinion:

"In its enactment Congress has not attempted to interfere in any way with the judicial department of the government, nor can the act be properly regarded as destroying any vested right, *since the right asserted to be vested is only the exemption of these judgments from review*, and the mere expectation of a share in the public lands and moneys of these Tribes, if hereafter distributed, if the applicants are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of a lower court, beyond the power of re-examination by a higher court though subsequently authorized by general law to exercise jurisdiction."

In any event, the entire litigation affecting questions of Indian citizenship, has been conducted upon the idea that membership in the Choctaw and Chickasaw Tribes necessarily carried with it a right to participate in the distribution of the tribal property. The decree of the Citizenship Court, that sought to vacate the decrees admitting parties to membership, was based wholly upon this contention, and we respectfully suggest that at this stage of the litigation, it should not be held that the decree admitting Hill to citizenship conferred no valuable property rights.

We respectfully submit that this cause should be re-

versed, with direction to dismiss the plaintiffs' complaint, and enter a decree confirming the defendant Hill, in his title to the land in question.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 260.

HUGH WALLACE ET AL., PLAINTIFFS IN ERROR,

v.

ELLA ADAMS ET AL., DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

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It is our intention, as far as possible, in the preparation of this brief to avoid ground already covered by the able argument presented by Messrs. Cruce, Cruce & Bleakmore. We desire, however, to present briefly as may be certain additional views which have particularly appealed to us.

In beginning this discussion, it seems important to call the attention of the court to—

The Exact Position Occupied by Choctaw Citizens Toward the United States at the Time of the Events Complained of.

By the agreement between the Choctaw and Chickasaw nations, entered into April 23, 1897, and embodied in chapter 517 of the Acts of the Second Session of the 55th Con-

gress (30 Stat., 495), it was provided that, except as modified by said agreement, tribal government should—

> "continue for the period of eight years from the fourth day of March, 1898;"

and, further, that—

> "The Choctaws and Chickasaws, when their tribal governments cease, shall become possessed of all the rights and privileges of citizens of the United States."

By a later act, that of March 3, 1901, chapter 868 (31 Stat., 1447)—

> "Every Indian in Indian Territory" was "declared to be a citizen of the United States and (was) is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

By section 31 of chapter 182 of the Acts of the 51st Congress, 1st session (26 Stat., 81)—

> "The Constitution of the United States * * * shall have the same force and effect in the Indian Territory as elsewhere in the United States."

It is apparent from the foregoing that a double citizenship was created, much as now exists with those of us who are at once citizens of the United States and of particular States, and that those who were Choctaws by birth or adoption were entitled, equally with other citizens of the United States, to possess and enjoy life, liberty, and property, unless the same were taken from them by "due process of law," in accordance with the constitutional provision.

But as Choctaws they possessed certain additional rights and privileges under their tribal government, which rights

and privileges, as we shall endeavor hereafter to show, constitute property, independent and apart from any question of ownership of particular tracts of land or ownership in common of tribal lands. For instance, only a Choctaw citizen could be a Representative (section 6, article 3, Choctaw Constitution), a Senator (section 3, article 3, Choctaw Constitution), or hold a number of offices (section 2, article 7, Choctaw Constitution). Citizens who found mines or mineral waters had the exclusive right and privilege of working the same within one mile from their works or improvements, not interfering with former settlers (section 18, article 7, Choctaw Constitution). Other public officers were only chosen by qualified electors (amendment, section 1, Choctaw Constitution). Non-citizens could only be employed after a permit had been obtained by their employers (section 2, title Permits, of the Laws). Before carpenters and workers at a number of different trades could engage in their callings, being non-citizens, they were required to obtain permits (section 3, title Permits). Permits were issued for the employment of non-citizen laborers (section 4, title Permits). The leasing of lands by citizens to non-citizens was expressly prohibited (section 2, title Claims and Improvements). Non-citizens not employed by a citizen of the Choctaw Nation and not authorized to live therein under a treaty stipulation who had made or bought improvements therein were notified to sell the same within a limited time (section 3, title Claims and Improvements). Non-citizens were not allowed to own, control, or hold any stock of any kind within the limits of the Choctaw Nation, except under permit, and then only subject to certain limitations (section 3, title Stockholders). Non-citizen herdsmen could not be employed by a citizen (section 2, title Stockholders). Non-citizens desiring to drive stock through the nation were required to pay a certain tax (paragraph 2, section 6, Stockholders). Non-citizens residing under trader's permit or otherwise were forbidden from enclosing any more lands

than sufficient to build their business or tenement house upon (section 1, act approved October 28, 1887). Citizens were forbidden from employing non-citizens to take charge of their cattle, etc., or hunt the same up when running on the ranch (under act passed November 9, 1887).

A certain recognition of the validity of the foregoing Indian laws is afforded by Morris *v.* Hitchcock (194 U. S., 384), which maintains that Chickasaw legislation imposing a privilege or permit tax on stock held by non-citizens was not repugnant to the Federal Constitution.

Conversely, citizens of the United States were under certain disabilities, so far as going into or transacting business within the Indian Territory is concerned. These varied disabilities added to the importance of Choctaw citizenship as such. For instance, and by way of illustration, section 2135 of the Revised Statutes provides for the punishment of any person other than an Indian who purchases certain articles from Indians within Indian country. Section 2157 prohibits any person other than an Indian from hunting or trapping game, except for subsistence, in Indian country. By section 2150 persons in the Indian Territory in violation of law could be ejected.

Can There Exist a Property Right in Citizenship Apart from a Right to a Particular Piece of Property?

In the decision of the Circuit Court of Appeals it was apparently considered that the plaintiffs in error had not been deprived of a property right, because their title to the tract of land in question had not been consummated by their names being formally placed upon the rolls of Choctaw citizens and the land not having been formally allotted to them. It was admitted that there had been a judgment or a finding of citizenship by the District Court of the Indian Territory, but the sufficiency of such judgment or finding in itself to

constitute property was tacitly denied or disregarded by the Circuit Court of Appeals.

In our view of the case, a judgment or finding of citizenship, carrying with it the special rights and privileges above set forth, as well as numerous other rights, concerning which extended discussion is unnecessary, constituted "liberty" or "property" of which the owner could not be deprived save by "due process of law."

Citizenship is more than a word; citizenship means, as we have above demonstrated, rights, privileges, and immunities not pertaining to non-citizens. The exact question as to how far a right of citizenship is included under the word "liberty" or "property" has received little consideration at the hands of the courts, but in so far as it has been touched upon the expressions of jurists are favorable to our contentions. We refer first to the much quoted and widely approved contention of Webster (Dartmouth College *v.* Woodward, 4 Wheaton, 518) to the effect that—

> "The meaning (law of the land) is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land."

In Braceville Coal Company *v.* People (147 Ill., 66; 37 Am. St. Repts., 209), cited approvingly in Low *v.* Rees Printing Company (41 Nebraska, 127; 63 Am. St. Repts., 683) it is said:

> "Property in its broader sense is not the physical thing which may be the subject of ownership, but is the right of dominion, possession and power of disposition which may be acquired over it, and the right of property preserved by the Constitution is the right not only to possess and enjoy it, but also to acquire it in any lawful mode or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt."

Again, it is declared that the terms "life," "liberty," and "property" are representative, and—

> "within their comprehensive scope are embraced the right of self-defense, freedom of speech, religious and political freedom, exemption of arbitrary arrests, the right to buy and sell as others may—all our liberties, personal, civil and political; in short, all that makes life worth living; and of none of these liberties can any one be deprived except by due process of law."
>
> 2 Story on Constitution, 5th edition, section 1950.

"Liberty" includes the right of a person—

> "to use his faculties in all lawful ways, to live and work where he will and earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. The laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession or confine him to work or live in a specified locality, or exclude him from his own house or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power * * *) are infringements upon his fundamental rights of liberty which are under Constitutional protection."
>
> In matter of Jacobs, 98 U. S., 98.

It has been repeatedly said that the term "property" includes the right to obtain and possess property. See cases above cited.

Furthermore, it is maintained, and that with justice, that a vested right of action is property and beyond the effect of change of law.

Williams *v.* Johnson, 30 Md., 500; 96 Am. Dec., 613.

We have already referred to the rights incident to citizenship, including the right to vote at elections. This particular right, of which, among others, the plaintiff in error

was deprived, is a property right, and so far a property right that for unlawful and malicious interference with its exercise election officers may be mulcted in damages. We refer to the case of Wiley *v.* Sinkler (179 U. S.), wherein, on page 65, this court found it impossible to say that the plaintiff, who claimed to have been unlawfully deprived of the right to vote by the action of election officers, had been damnified in a lesser sum than $2,500, it being the function of the jury to determine the question. This case was followed in Swafford *v.* Templeton (185 U. S., 487), showing that denial of the right to vote created a cause of action.

In the presence of the decisions above quoted and many others which might be cited we are compelled to believe that when the plaintiffs in error lost citizenship through the judgment of the citizenship court they were deprived of their liberty, for they might no longer exercise it within the limits of the Choctaw tribes as citizens; but they were also deprived of their property, for the right to gain a livelihood, to earn property, was in itself a property right, and by the judgment of the citizenship court became trammeled within the limits of the Choctaw Nation.

To say less than this is to say that citizenship is a right of less importance than the right of a corporation to exist; for it is too well established to need citation of authority that a corporation's franchise (which is its right to be a corporation) is a property right. Citizenship means the right of a man to exercise the functions and to be entitled to the immunities of a member of society. It is the badge of his political existence and the breath of his life as a member of the community. Can so great a right be less than liberty and property, and the rights of a man be less than the rights of a corporation?

We are bound, it seems to us, to conclude that the plaintiffs in error by the citizenship court judgment were deprived of something which they could only properly lose by due process of law, and we are brought to the question:

What is Meant by Due Process of Law?

We discuss this but briefly, referring to several of the more useful decisions without elaborating them.

In Holden *v.* Hardy (169 U. S., 389) Justice Brown said:

> "This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard, as that no man shall be condemned in his person or property *without due notice and an opportunity of being heard in his defense.*"

In Davidson *v.* New Orleans (69 U. S., 97), the court said:

> "Can a State (under the 14th amendment) make anything due process of law which by its own legislation it chooses to declare such? To affirm this is to hold that the prohibition to the State is of no avail or has no application where the invasion of private rights is effected under the forms of State legislation."

(Of course, the argument just given, having particular application to the fourteenth amendment affecting States, has a similar and equally forceful effect when applied to "due process of law" as touching Federal action.)

So in C., B. & Q. R. R. *v.* Chicago (166 U. S., 266) the court says that the prohibitions of the 14th amendment—

> "refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities."

In Pennoyer *v.* Neff (95 U. S., 747) Judge Field declared that "due process of law" means—

> "A course of legal proceedings according to those rules and principles which have been established in

> all systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent by its constitution,—that is by the law of its creation,—to pass upon the subject-matter of the suit, and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State or his voluntary appearance."

The essential point of the foregoing decisions, aside from declaration of the necessity of the use of the other usual legal instrumentalities, is the paramount importance of *notice*.

In the light of the foregoing principles, let us answer, if we may, the question:

Was the Judgment of the Citizenship Court the Result of the Exercise of Due Process of Law?

For the purpose of the argument of this brief merely, let us concede that it was possible for Congress, by suitable legislation, to cause the judgment of the District Court of the Indian Territory, affirmed by the Supreme Court of the United States, to be reviewed by a citizenship court or any commission acting under the forms of law, addressing ourselves, therefore, solely to the inquiry as to whether the forms of law, protective as they are of individual rights and forbidding condemnation without due notice, were departed from in the extraordinary procedure provided by congressional legislation.

The action which, pursuant to legislation, was brought by the Choctaw and Chickasaw nations before the citizenship court was essentially subject to the principles of a bill of review or a bill to impeach a decree; but, before treating it as such, let us consider whether it was within the power of the court, under any theory of chancery powers, to summon ten defendants as representatives of the separate rights of three thousand people.

Let us clearly bear in mind the circumstances. Three thousand people had obtained separate and distinct judgments determining as to each one of them that he had the right to hold office and to enjoy all the other immunities and privileges incident to citizenship in the Indian Territory. The right of each man was distinct from the right of his fellows, depending upon the fact that he individually, or his ancestor, was by birth or adoption a citizen of the Choctaw Nation. No one man could claim a right to citizenship because of anything he held under a common title with another man. The case of each had to stand or fall upon its own merits. The situation was in nowise akin to that presented by cases wherein suits were allowed to be brought in equity against a certain number of persons as representatives, let us say, of all the membership of a voluntary organization jointly interested in the outcome; for in this instance there was no joint interest, each man being concerned only in his own judgment for citizenship, and no man being obliged by virtue of his position to defend a right which he enjoyed in common with another who might be affected by the same principle of decision.

The suit under examination could not be compared to that brought by some shareholders in a joint-stock company of six thousand shares, on behalf of all the stockholders, to compel the directors of the company to refund money improperly withheld by them from the stockholders of the company and applied to their own use (Hitchins *v.* Congreve, 4 Russ., 562-576); for in that case, as the court said, all the shareholders had one common right and one common interest to be subserved by the suit.

And, turning to cases where a few have been permitted to defend for the many, the action under consideration finds no precedent, for instance, in bills which have been permitted to be brought by the lord of a manor against a few of his tenants, defending for all, to establish some right, as, for instance, a right of common or a right to cut turf;

for, as is said in such cases, the bill should be on behalf of or against all the tenants, as, if it be a common right claimed by all and interrupted and denied to all, a bill by a single tenant would not be proper.

Baker *v.* Rogers, Sel. Cas. Ch., 34.

In the present case we note that the first action was brought by single claimants or families of claimants. No one or two or more could have brought suit against the Choctaw or Chickasaw nations, on behalf of themselves and all similarly situated, to establish a common right of citizenship (particular and specific as is such a right), and, conversely, no suit could be brought against a few, requiring them to defend for all, on any theory of common right.

For the purpose of our argument, we need not, at the present time, deny the right of the citizenship court to deal with the ten separable interests represented by the ten defendants actually before the court, but we only deal with the right of representation. As instructive, we find, according to Thornton *v.* Hightower (17 Georgia, 1), that where parties liable to a demand are very numerous a complainant may proceed against a part of them for their *aliquot shares.* The very theory of this decision appears to deny the right of the court to go beyond the aliquot shares and deal with the shares of individuals in person.

In Baker *v.* Portland (Fed. Case No. 777) contractors separately interested in employing Chinese labor were not allowed to join in a bill to permit the carrying out of that purpose, the court saying:

> "They have no common interest in the subject or object of the suit, but assert distinct and several claims against the defendant growing out of distinct and several contracts and matters relating thereto."

The opinion in this case received the confirmation of Mr. Justice Field.

We submit that the idea of this court as to what constitutes "due process of law" in cases such as the present has been crystallized in an appropriate manner in rule 48 of the Rules of Practice in Equity, providing as follows:

> "Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. *But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.*"

The idea we are now maintaining finds very direct support in the decisions of this court. In the case of Ayres *v.* Carver (17 How., 591) the complainant sought to establish an equitable title to large tracts of public lands in Mississippi, having offered to comply, as he alleged, with the law providing for the entry and purchase at private sale of the several tracts, but was prevented from making the entries and obtaining the necessary certificates by the illegal and unwarranted acts of the register and receiver at the land office. The bill was filed against the parties who had subsequently entered and paid for the land and obtained the necessary certificates upon which patents had been issued. The defendants were alleged to be very numerous and the court below dispensed with the necessity of making all of them parties, directing that their interests should be represented by some seven, on whom process was directed to be served. This court in commenting upon this procedure said:

> "Without intending to express any definitive opinion in this matter, we may say that it is difficult to see any interest or estate in common among these several defendants that would authorize the rights of the absent parties to be represented in the litiga-

> tion by those upon whom process has been served and who have appeared to defend the suit. Their title to the land claimed by the complainant is *separate and independent, without anything in common, it would seem, that could have the effect to make a decree against one binding upon the others* or even require them to join in the defense."
>
> Smith *v.* Swormstedt, 16 How., 288.

In the case of Smith *v.* Swormstedt, referred to, it was held that where the parties are very numerous and have or may have separate and distinct interests there may be representation:

> "Yet there must be a common interest or a common right which the bill seeks to establish or enforce. As an illustration, bills have been permitted to be brought by the lord of the manor against some of the tenants in behalf of themselves and the other tenants to establish some right, such as suit to a mill, or right of common, or to cut turf. So, by a parson of a parish against some of the parishioners to establish a general right to tithes—or conversely, by some of the parishioners on behalf of all to establish a parochial *modus*."

Over and beyond the reasons above stated for the impossibility of joining ten men to represent three thousand in such a case as the present lies the fact, hereafter more fully adverted to, that the suit in the citizenship court was merely a revival of three thousand actions which had already been carried to judgment, and under such circumstances a review or a new hearing cannot be had without bringing into court the very men designed to be affected by such a course of procedure. This, as we know, was never done.

In addition to the foregoing, as is said by this court in Bank of U. S. *v.* White (8 Pet., 262), Mr. Justice Story speaking—

> "The principle is unquestionable that all the parties to the original decree ought to join in the bill of review."

If we call the highly anomalous proceeding before the citizenship court a bill of review (and whether it be technically so or not, it must be subject to the general principles of law dominating bills of this kind), we must confess that the proceeding should fail for want of proper parties. Out of some three thousand persons, who were not too numerous to successfully prosecute their individual claims to final judgments, ten have been arbitrarily selected, not by the court even, but by the parties adversely interested, and have been caused to stand for their fellows, in defiance of the principle that all the parties originally interested should have been present.

But more. It is well settled that only those who were parties to the original proceeding were entitled to bring a bill of review (Ency. of Law, title Bills of Review, vol. 3, p. 560), while in the present case confessedly as to every one of the defendants before the citizenship court there was at least one nation seeking to have the decrees reviewed which had not been a party to them. So far is the principle to which we have just alluded carried, *cestuis que trustent* represented in the original proceeding by their trustees against whom they make no charges are not entitled to prosecute a bill of review (Shaw *v.* Little Rock and Fort Smith R. R. Co., 10 Otto, 605). And, again, even an assignee was not allowed to prosecute a bill of review (Thompson *v.* Maxwell Land Grant and R. R. Co., 5 Otto, 391).

Was the Proceeding Before the Citizenship Court Good as a Bill to Impeach a Judgment?

The principles involving the right by due process of law to bring bills to impeach judgment do not materially differ from the same rights with relation to bills of review, and we only refer to the suggestion that this may be a bill to impeach a judgment for fear we may be considered to have overlooked it.

According to Encyclopedia of Pleading and Practice (vol. 3, p. 610)—

> "A bill to impeach a decree for fraud is termed generally an original bill in the nature of a bill of review, partaking of the character of both classes of bills, though in its essential features, it is an original and independent proceeding."

In Harwood *v.* Cincinnati and Chicago Air Line Company (17 Wall., 78) it was stated that an attempt to impeach a decree not joining the original party plaintiff was—

> "against authority and principle. No case is cited to justify it and it is believed that none can be found. The judgments of courts of record would be scarcely worth obtaining if they could be thus lightly thrown aside. The absence of the plaintiff in the original suit is a fatal defect."

Nearly three thousand parties in the proceedings before the citizenship court (although the original plaintiffs had been present in the suits before the Dawes Commission and before the district courts) were absent, and so absent without any manifest reason. They were known; they possessed individual rights; so far as we are aware, they resided in the Indian Territory; and yet their property was taken from them without anything approaching due process of law.

Whether we address ourselves, therefore, to the form of the proceeding in the citizenship court as a bill of review or as

a bill to impeach a judgment, whether we consider the parties brought before the court or the manner in which they were so brought, we are bound to conclude that, as against the plaintiffs in error in this case, the judgment of the citizenship court was not due process of law. To the same conclusion must we come if we call it an appeal or quasi-appeal, for no citation was issued, nor were any proceedings had in open court in the district court of the Indian Territory making the issuance of citation unnecessary.

In short, the whole proceeding was the arbitrary exercise of arbitrary power.

Can It Be Suggested That the Proceeding in the Citizenship Court Was a Proceeding in Rem and Personal Notice Was Unnecessary?

The original action seeking for judgment of citizenship was highly personal and not *in rem*. It was not brought to determine the title to property, but to settle a man's right to participate in the affairs of his nation, to partake of the benefits of citizenship, and to be subject to all of its limitations. Since at least the case of Pennoyer *v.* Neff, it has been the established doctrine of this court that personal actions require personal service. That the action was personal is apparent from the language of the act of June 10, 1896 (29 Stat., 321), which authorized the Dawes Commission to—

> "hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled."

The same act further provided that upon appeal to the United States district court—

> "the judgment of the court shall be final."

Certain consequences flow from a judgment of citizenship, the right to a determinate tract of land being one; but the purpose of the suit was to determine citizenship, the consequences being merely incidental.

We do not barter and sell citizenship. It is not sold by weight and measure, as may be articles of personal property, or by acreage, as real estate. It does not lie open to the world, but is the invisible and impalpable panoply of the man who wears it. The law cannot seize upon citizenship and bodily transfer it. The law recognizes it as a condition and a right—a right immediately and intimately personal to the man in whom it is vested—and so it seems to us as really beyond discussion that citizenship is only to be given and only to be taken away when the man affected by it is personally before the court. No pretense of personal service can be suggested as to the client we represent or his three thousand (less ten) associates, and by all the decisions already quoted and by others so numerous that their very citation would weary the court, it can be demonstrated that no judgment of a personal character can be had without the presence of the party concerned, and that this presence must be in person, and not by representation and not by advertisement, we think is already sufficiently demonstrated.

What Analogies are Offered by a Judgment of Naturalization to the Case at Bar?

We shall respectfully submit that in its essence a judgment of citizenship is to be compared to a judgment of naturalization, dealing, as both do, with the relations between the man and the government under which he would place himself. It is argued in the opinion of the Circuit Court of Appeals that the establishment by Congress of tribunals to pass upon the status of men as citizens of the Indian tribes was the endowing of the courts and commissions so authorized with power to pass upon a political question, and, if

Congress were not satisfied with their determination, with the power always in Congress to supervise and change. The opinion says (Record, page 38) that Congress had the right to strike down the judgment—

> "at any time before an allotment of lands under its previous acts had been finally made to the defendant;"

and on page 40, because the Dawes Commission had not allotted the land in dispute to the plaintiff in error—

> "he had * * * acquired no vested right in it as against subsequent legislation of the United States, because until such an allottment was made all the proceedings determinative of citizenship and of distribution which derived their force and effect from the legislative power of the United States alone were necessarily subject to the further exercise of that authority."

The whole argument of the court is based upon the idea that in determining the plaintiff in error to be a citizen the courts exercised therefor a political power.

But was the power exercised by the courts any more a political power than that exercised by them in cases of naturalization? We submit not. The granting of naturalization is undoubtedly a political power. The Constitution declares that Congress shall have power to establish—

> "an uniform rule of naturalization."

This Congress has done in a general way, deputing to courts the determination of the question whether a particular man is entitled to the benefits of citizenship just as Congress might have deputed the power to the clerk of the court, or the United States marshal, or even, if you will, to a postmaster. Equally had Congress power under the Constitution—

> "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States,"

and equally could Congress, as it has, confer the power upon the Commissioner of the General Land Office and the Secretary of the Interior to grant mining and other patents to portions of such territory.

When, however, the courts have undertaken to deal with matters of naturalization, they have treated their power as judicial, and their judgments entitled to the same degree of sanctity in such cases as are their judgments in any other cases within their jurisdiction. Perhaps the earliest—certainly one of the most important—cases upon this point was that of Spratt *v.* Spratt (4 Pet., 406). Referring to naturalization, Chief Justice Marshall said:

> "The judgment has been rendered in a form which is unexceptionable. Can we look behind it and inquire on what testimony it was pronounced?"

And, again, on page 406:

> "This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry, and like every other judgment, to be complete evidence of its own validity."

Among the many citations of the Spratt case of interest in this connection we refer to the Acorn, Fed. Cas. 29, holding order of court of competent jurisdiction admitting an alien to citizenship is conclusive; U. S. *v.* Gleason, 78 Fed., 397; and Pintsch Co. *v.* Bergin, 84 Fed., 141, holding certificate cannot be set aside on ground that facts were falsely represented; Scott *v.* Shobach, 49 Ala., 488, holding certificate cannot be collaterally impeached unless for want of jurisdiction; *Ex parte* Knowles, 5 Cal., 301, declaring power to naturalize is judicial by act of Congress; State *v.* Macdonald, 24 Minn., 59; and McCarthy *v.* Marsh, 5 N. Y.,

284, holding record of proceedings in naturalization cannot be questioned collaterally; People *v.* Snyder, 41 N. Y., 409; Commonwealth *v.* Towles, 5 Leigh, 746, and State *v.* Hoeflinger, 35 Wis., 400, maintaining record of naturalization is conclusive; State *v.* Brandhorst, 156 Mo., holding judgment naturalizing minor cannot be collaterally attacked.

In the last-named case it was held that judgment of naturalization could only be annulled or set aside by appeal or writ of error taken for that very purpose, but might be impeached for fraud, for which see U. S. *v.* Norsch, 42 Fed., 417.

The authorities indicating that judgments of naturalization may be vacated upon bills in equity filed by the Attorney General in the Circuit Court of the United States are summed up in Moore's Digest of International Law, title Nationality, vol. 3, page 500.

It has been apparently beyond judicial conception that a judgment of naturalization could be set aside save in a direct proceeding for that purpose (or on appeal), in which the very person receiving the naturalization was a responsive party and brought into court by personal process to answer the complaint against him. Such for one hundred years has been due process of law in this respect, based upon notice and the right of the true defendant to be heard. Can any reason be suggested why a determination of a court adjudging citizenship should be treated with less respect?

We will not lose sight of the fact that even the member of a voluntary association may not be excluded from its organization save upon due notice and upon sufficient grounds. Shall a lesser rule be applied to those who by the judgment of courts have been determined to be members of Indian tribes?

The suggestion is apparently made in the opinion of the Circuit Court of Appeals that the plaintiffs in error have no cause of complaint in the granting of a new trial (the

court ignoring the errors and blunders in connection with the new trial, if it be so called, to which we have alluded) because they obtained from the Dawes Commission and district court new trials of their right of citizenship after they had been "rejected" as citizens by the duly constituted authorities of the Choctaw Nation. We are unable to discover upon the face of the record by what authority the Circuit Court of Appeals found the rejection of citizenship. The answer (Record, page 7) shows that the citizenship had been "questioned."

We do not deny the superior right of the United States Congress to fix rules and regulations by which the citizenship question could be finally determined, even after the tribal authorities had acted, although they did not act in this case. We do deny the right of the United States Congress to take away substantial rights, privileges, and immunities once duly conferred, and particularly to take them away without due process of law.

Was the Plaintiff in Error in This Case a Choctaw Citizen in the Full Sense of the Term?

While the judgment in the District Court of the Indian Territory conferred citizenship without qualification or limitation, it may be worth while, in view of the language of the Supreme Court in the case of Stephens *v.* Cherokee Nation (174 U. S., 445), to demonstrate that Choctaw citizenship as conferred upon the plaintiff in error carried with it all the rights, privileges, immunities, and property that could possibly attach to the word. The particular language in the Stephens case to which we refer is as follows:

> "It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made as if there might be circumstances under which the right to share in the latter would not necessarily follow from the concession of the former."

We are moved the more to discuss this proposition with regard to our Choctaw clients because of the recent consideration of different grades of citizenship in the case of Red Bird *v.* The U. S. (decided November 5, 1903), and which discusses the limitation of citizenship attached to intermarried white persons claiming under Cherokee laws.

The finding of the District Court of the Indian Territory was that the plaintiff in error (with others) should—

> "be admitted as members of the Choctaw tribe of Indians by blood and that the applicants, Amanda Hill, wife of J. M. Hill, and Adelia Hill, wife of B. C. Hill, each and both be admitted as members of the Choctaw Nation by intermarriage" (Record, page 8).

Article 38 of the treaty of 1866 between the Choctaws and Chickasaws provides:

> "Every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw Nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation and shall be subject to the laws of the Choctaw and Chickasaw nations according to his domicile, and to prosecution and trial before their tribunals and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw."

The Choctaw laws (Durant's Constitution and Laws of the Choctaw Nation, published by authority of the General Council, page 225) provided the circumstances under which—

> "any white man, a citizen of the United States or any foreign government, desiring to marry a Choctaw woman may so do;"

and section 5 of the act says:

> "Should any man or woman, a citizen of the United States or of any foreign country, become a

> citizen of the Choctaw Nation by intermarriage as herein provided and be left a widow or widower, he or she shall continue to enjoy the rights of citizenship unless he or she shall marry a white man or woman or person, as the case may be, having no rights of Choctaw citizenship by blood; in that case all his or her rights acquired under the provisions of this act shall cease."

The same laws fix the degree of Choctaw blood entitling one to citizenship to be one-eighth. (Page 266.)

By the act of May 21, 1883 (on page 335 of the same publication) freedmen are given the full right of citizenship—

> "except in the annuity moneys and the public domain of the nation."

From the foregoing, no other qualifications being known to us, it sufficiently appears that the plaintiff in error in this case, B. C. Hill, the only real party in interest, has been duly found to be a Choctaw citizen by blood, and as such is subject to no disability whatever in the way of claiming title to part of the former property of the nation.

Summary.

Summarizing the foregoing, we conclude that—

The plaintiff in error at the time the Citizenship Commission undertook to set aside his judgment was a citizen of the United States, entitled to all the protection given by our Constitution and laws.

He enjoyed a right of property in the judgment of a Federal court finding that he was a Choctaw citizen.

This right of property or, as it might be styled, "liberty" or "immunity" he could only be deprived of by due process of law.

The Citizenship Commission undertook to deprive him of this right of property without due process of law, in that—

a. He was never made a party in his own name to the proceedings brought to destroy the judgment of the District Court of the Indian Territory.

b. While the principle of representation is attempted to be applied to him, it could not be so applied.

c. The proceeding to set aside his judgment was personal in its nature, and yet an attempt was made to bring him in by representation and by publication, contrary to law and practice.

d. Only parties to the prior bill or judgment can be made parties to a bill of review or bill to impeach a judgment, and yet in this case a new party was introduced, and the original parties plaintiff ignored except as to ten.

The plaintiff in error was by the judgment of the District Court in the Indian Teritory made a Choctaw citizen in the full sense of the term and entitled to share in the lands and funds of the tribe.

In view of all the foregoing considerations, we respectfully submit that the judgment below must be reversed and the prior judgment of the United States Court for the Indian Territory and of the Supreme Court of the United States must be sustained.

Respectfully submitted.

JACKSON H. RALSTON,
FREDK. L. SIDDONS,
WILLIAM E. RICHARDSON,
Attorneys for Plaintiffs in Error.

FILE COPY.

In the Supreme Court of the United States

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
FILED.
DEC 21 1906
JAMES H. McKENNEY,
CLERK.

No. 260.

HUGH WALLACE, ET AL., Plaintiffs in Error,

vs.

MRS. ELLA ADAMS, FOR HERSELF AND AS NATURAL GUARDIAN AND NEXT FRIEND OF HENRY McSWAIN AND ROMA McSWAIN, HER MINOR CHILDREN, Defendants in Error.

In error to the United States Circuit Court of Appeals for the Eighth Circuit.

Motion of the Choctaw and Chickasaw Nations Asking Leave to File Brief and Argument as Amici Curiae.

Brief and Argument on behalf of the Choctaw and Chickasaw Nations.

GEORGE A. MANSFIELD,
J. F. McMURRAY,
MELVEN CORNISH,
Attorneys for the Choctaw and Chickasaw Nations.

To the Honorable Judges of the Supreme Court of the United States:

Come the Choctaw and Chickasaw Nations by George A. Mansfield, J. F. McMurray and Melven Cornish, their attorneys, and respectfully represent:

That this case brings directly before this Honorable Court the question of the constitutionality and validity of Sections 31, 32 and 33 of the Act of Congress, approved July 1, 1902, entitled:

"An act to ratify and confirm an agreement with the Choctaw tribe of Indians and the Chickasaw tribe of Indians and for other purposes"

creating the Choctaw and Chickasaw Citizenship Court.

That the said Nations are vitally interested in upholding the constitutionality and validity of such legislation and the validity of the decrees of said court for the reason that several thousand citizenship applicants who were not entitled, were thereby denied citizenship and the right to participate in the distribution of tribal property;

That notwithstanding such interest, they were not made parties, in the trial Court, and had no notice or information of the pendency of the case, and

That from an examination of the record, it will appear that a motion similar to this was presented to the United States Circuit Court of Appeals, for the Eighth Circuit, and the permission herein prayed for, was granted.

Wherefore, your petitioners, the Choctaw and Chickasaw Nations, respectfully ask that they may be heard upon such issues arising in the case as may affect

their interests, by the filing of a brief and argument or otherwise, as the Court may deem proper.

THE CHOCTAW NATION AND
THE CHICKASAW NATION, BY
GEORGE A. MANSFIELD,
J. F. McMURRAY,
MELVEN CORNISH,
Their attorneys.

STATEMENT.

The appellee Ella Adams, for herself and as natural guardian and next friend of Henry McSwain and Roma McSwain, her minor children, brought an action of ejectment in the United States Court for the Southern District of the Indian Territory at Ardmore, against the appellants. The complainant sets forth that she and her children are members of the Chickasaw Nation or tribe of Indians and that the lands for which they sue had theretofore been duly allotted to them by the Commission to the Five Civilized Tribes. They pray judgment for possession of the premises, allege that the defendants are insolvent and ask that a receiver be appointed to collect rents and hold subject to the disposition of the suit.

The defendant, B. C. Hill, filed an answer in which he denied that he was not a member of any Indian tribe, but alleged that he was a member of the Choctaw tribe of Indians by blood; that he was in possession of the lands sued for and had improved the same, and that he bases his right to hold possession of the lands as a member of the Choctaw Nation or tribe of Indians upon the following facts, substantially detailed in his answer:

That on the 10th day of August, 1896, he applied to the Commission to the Five Civilized Tribes who were acting under authority of the Act of Congress of June 10, 1896, to enroll him as a member of the Choctaw Nation or tribe of Indians, his right to membership in the tribe having been questioned by the Choctaw tribal authorities; that his application for enrollment was signed and sworn to and a copy, together with a copy of all the evidence relied upon, was within thirty days after the filing of his application, furnished to the Governor of the Choctaw Nation; that his application was acted upon by the Commission and membership in the tribe denied him, and thereafter, he appealed from the finding of the Commission to the United States Court for the Southern District of the Indian Territory at Ardmore, and that on the 8th day of March, 1898, in cause number 149, and entitled "J. M. Hill, *et al.*, *vs.* The Choctaw Nation," a judgment was rendered by that court admitting the defendant, B. C. Hill and others, to citizenship in the Choctaw Nation or Tribe of Indians.

He then recites, in substance, the establishment by Congress of the Citizenship Court and sets forth the decree of the court rendered in the test case provided by law entitled: "The Choctaw and Chickasaw Nations or Tribes of Indians *versus* J. T. Riddle, *et al.*," alleges that he was not a party to the proceedings before that court; that no notice was served upon him; that the court was without power to pass upon his right or vacate the judgment secured by him in the United States Court for the Southern District of the Indian Territory and that therefore he was not in any way affected thereby; that he appeared before the Commission to the Five Civilized Tribes, exhibited a certified copy of

the decree of the United States Court for the Southern District of the Indian Territory, admitting him to citizenship in the Choctaw Nation or tribe of Indians and asked to be enrolled as a member of that tribe; that the Commission refused to so enroll him and still so refuses upon the ground that the decree of the Choctaw and Chickasaw Citizenship Court vacated and annulled the decree of the United States Court for the Southern District of the Indian Teritory, declaring the said B. C. Hill to be a member of the Choctaw tribe of Indians. He further says that on the 15th day of September, 1904, he appeared before the Commission to the Five Civilized Tribes and demanded the right to select the lands sued for in this suit for his allotment and demanded that the same be allotted to him as a member of the Choctaw Nation or tribe of Indians and that this request was refused; that he then asked permission from the Commission to file a contest, contesting the right of the plaintiffs to allot the lands and that this request was, by the Commission, without authority of law and without investigation, refused.

He then states that the Commission would enroll him as a member of said tribe of Indians and would allot said lands to him except for the fact that the members of the Commission hold that the judgment of the Choctaw and Chickasaw Citizenship Court vacated the judgment of the United States Court for the Southern District of the Indian Territory, admitting the said B. C. Hill to citizenship in the Choctaw Nation. The answer of the defendant, B. C. Hill, concudes with a prayer that the "cause be transferred to the Equity Docket; that the filing of the plaintiffs upon said lands be cancelled; that he be declared to be the owner of said lands; that he be quieted in his title

to the possession of the same; for his costs and all other proper relief." The other defendants adopt the answer of Hill as their own.

The plaintiffs filed a demurrer to the answer, stating that the same did not set up facts sufficient to constitute a defense to the complaint, which was by the court sustained and the defense refusing to plead further, judgment was rendered in accordance with the prayer of the plaintiff's complaint.

The plaintiffs in error thereupon appealed to the United States Court of Appeals for the Indian Territory which sustained the finding of the lower court. The case was then taken by writ of error to the United States Circuit Court of Appeals for the Eighth Circuit and thence to this Court. The decision of the Circuit Court of Appeals was an affirmance of the Indian Territory Court of Appeals and likewise of the United States Court for the Southern District of the Indian Territory.

The issue sought to be raised by this proceeding is the constitutionality of the Act of July 1, 1902 (32 stat., 641, 646–9), creating what is known as the Choctaw and Chickasaw Citizenship Court, and authorizing it to review the judgments of the United States Courts in the Indian Territory admitting persons to citizenship and enrollment as such citizens in the Choctaw and Chickasaw Nations, said cases having been appealed to said courts from the Commission to the Five Civilized Tribes by authority of the act of Congress of June 10, 1896 (29 Stat. 321–339).

By this Act Congress pursued its plan of extinguishing the tribal title to lands in Indian Territory, and of allotting the same to the members of the tribes, with a view of ultimately making a state out of the area embraced in the lands of the tribes, and authorized

the Dawes Commission to hear and determine the applications of all persons whose rights were denied by the tribal authorities to be enrolled as citizens of said tribes. The Commission was authorized to administer oaths, compel the attendance of witnesses, send for persons and papers, etc., "and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming said citizenship, or to protect any of said nations from fraud or wrong." It was also provided by the Act of June 10, 1896, that the tribes or any person aggrieved with the decision of the tribal authorities or the Commission, might appeal to the United States District Court whose judgment should be final. The Commission was required to make up from these different sources a roll of the citizens of the tribes and to file the list of persons as they finally approved them with the Commissioner of Indian Affairs to remain there for use as the final judgment of the duly constituted authorities as to who were members of the tribes.

In exercising the appellate jurisdiction conferred upon them by the act of June 10, 1896, the United States Courts in Indian Territory did not limit their inquiry to a review of the citizenship cases appealed thereto from the Dawes Commission upon papers and evidence submitted by that Commission, but examined such cases *de novo* upon evidence taken before the commissioners appointed for that purpose. As a result it was claimed by the Choctaw and Chickasaw Nations that opportunity was given for the commission of fraud and perjury by numerous persons commonly called "Court Claimants," who wrongfully sought admision into said tribes, and whose applications had been denied by the Commission to the Five Civilized Tribes.

The Choctaw and Chickasaw Nations accordingly filed protests with the Dawes Commission against the enrollment of all such persons as members of their respective tribes, alleging illegality and fraud in the procurement of the judgments and further, that because of the failure to give notice of such proceedings to both nations and for other irregularities, the judgments were void.

By a provision in the Indian Appropriation Act of July 1, 1898, (30 Stat. 591), inspired, to be inferred from later events, by dissatisfaction with the proceedings of the United States Courts in Indian Territory in such cases, an appeal was allowed to either party from these courts in all citizenship cases to the Supreme Court of the United States upon all questions involving the constitutionality or validity of any legislation affecting citizenship or the allotment of lands in the Indian Territory.

In Stephens *versus* the Cherokee Nations, 174 U. S. 445, however, it was held that the appeal given by this act was restricted to the determination of the constitutionality and validity of the legislation by Congress affecting citizenship or the allotment of lands in the Indian Territory, and did not extend to a review of either class of cases upon their merits. The constitutionality and validity of the legislation was upheld.

In pursuance of a further attempt to prevent the "Court Claimants" from being enrolled, certain individual members of the Choctaw and Chickasaw Nations endeavored to sue for themselves and all other members of said tribes, and filed a bill in equity in the United States Court for the Southern District of the Indian Territory, against Goodall and others, referred to in the brief of appellants. It is not perceived, how-

ever, that this suit could have any bearing upon the present case other than as an indication of the deep sense of wrong and injustice which the members of the Choctaw and Chickasaw nations had in reference to the action of the United States courts in admitting the persons commonly known as "Court Claimants" to citizenship.

These matters being called to the attention of the Secretary of the Interior by protests and briefs filed by the attorneys of the two tribes, he directed the Dawes Commission to negotiate a supplementary agreement with the Choctaw and Chickasaw Nations. Such treaty was made on the 7th of February, 1901. In transmitting it to Congress for approval the Secretary of the Interior stated that experience had demonstrated that the Atoka Agreement (Act of June 28, 1898), was faulty and did not work to the satisfaction of the Indians or the public, and that there was pressing reason for supplementing it by another and further agreement; and, referring to the citizenship judgments rendered by the United States Courts for the Central and Southern Districts of the Indian Territory, he said:

"Believing that the questions affecting the validity and rectitude of these judgments deserve judicial investigation and scrutiny, article 8 has been redrawn, as is shown in the amended draft of the agreement, so as to provide for a fair, speedy and final decision of these questions by judicial tribunals."

This agreement was not transmitted in time to be acted upon by Congress at that session and the Secretary of the Interior directed the Dawes Commission to negotiate another agreement along the same lines to be submitted to the 57th Congress at its first ses-

sion. This last agreement, which provided for the creation of the Choctaw and Chickasaw Citizenship Court and authorized the review of the citizenship judgments in question, was concluded between representatives of the United States and the Choctaw and Chickasaw Nations on March 21, 1902, and ratified and confirmed by Act of Congress of July 1, 1902, (32 Stat. 641). The provisions of the same in reference to the Choctaw and Chickasaw Citizenship Court which it is thought necessary to consider here, as follows:

"27. The rolls of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen shall be made by the Commission to the Five Civilized Tribes, in strict compliance with the act of Congress approved June 28, 1898 (30 Stats. 495), and the act of Congress approved May 31, 1900 (31 Stats., 221), except as herein otherwise provided: *Provided*, That no person claiming right to enrollment and allotment and distribution of tribal property, by virtue of a judgment of the United States court in the Indian Territory under the Act of June 10, 1896 (29 Stats., 321), and which right is contested by legal proceedings instituted under the provisions of this agreement, shall be enrolled or receive allotment of lands or distribution of tribal property until his right thereto has been finally determined.

"Sec. 31. It being claimed and insisted by the Choctaw and Chickasaw Nations that the United States Courts in the Indian Territory, acting under the Act of Congress approved June 10, 1896, have admitted persons to citizenship or to enrollment as such citizens in the Choctaw and Chickasaw nations, respectively, without notice of the proceedings in such courts being given to each of the said nations; and it being insisted by said nations that, in such proceedings,

notice to each of said nations was indispensable, and it being claimed and insisted by said nations that the proceedings in the United States courts in the Indian Territory, under the said Act of June, 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commission, and should not have extended to a trial *de novo* of the question of citizenship; and it being desirable to finally determine these questions, the two nations, jointly, or either of said nations acting separately and making the other a party defendant, may, within 90 days after this agreement becomes effective, by a bill of equity filed in the Choctaw and Chickasaw citizenship court hereinafter named, seek the annulment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship or enrollment by said courts, with notice to one but not to both of said nations, shall be made defendants to said suit as representatives of the entire class of persons similarly situated, the number of such persons being too numerous to require all of them to be made individual parties to the suit: but any person so situated may, upon his application, be made a party defendant to the suit. Notice of the institution of said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant as aforesaid, and upon each of said ten representative defendants, and shall also be published for a period of four weeks in at least two weekly newspapers having general circulation in the Choctaw and Chickasaw nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering the same, which shall not be less than thirty days after the last publication. Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizen-

ship or enrollment by said United States courts in the Indian Territory was wrongfully obtained as provided in the next section. In the event said citizenship judgments or decisions are annulled or vacated in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers and proceedings in any citizenship case in which the judgment or decision is so annulled or vacated, shall, upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said citizenship court by the court having custody and control of such files, papers and proceedings, and, upon the filing in such citizenship court of the files, papers and proceeding in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification thereof has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein.

32. Said citizenship court shall also have appellate jurisdiction over all judgments of the courts in Indian Territory rendered under said Act of Congress of June tenth, eighteen hundred and ninety-six, admitting persons to citizenship or to enrollment as citizens in either of said nations. The right of appeal may be exercised by the said nations jointly or by either of them acting separately at any time within six months after this agreement is finally ratified. (In the exercise of such appellate jurisdiction said citizenship court shall be authorized to consider, review, and revise all such judgments, both as to *findings of fact* and *conclusions of law*, and may, wherever in its judgment substantial justice will thereby be subserved, permit either

party to any such appeal to *take and present such further evidence as may be necessary to enable said court to determine the very right of the controversy.* And said court shall have power to make all needful rules and regulations prescribing the manner of taking and conducting said appeals and of taking additional evidence therein. Such citizenship court shall also have like appellate jurisdiction and authority over judgments rendered by such courts under the said act denying claims to citizenship or to enrollment as citizens in either of said nations. Such appeals shall be taken within the time hereinbefore specified and shall be taken, conducted and disposed of in the same manner as appeals by the said nations, save that notice of appeals by citizenship claimants shall be served upon the chief executive officer of both nations: *Provided*, That paragraphs thirty-one, thirty-two and thirty-three hereof shall go into effect immediately after the passage of this Act by Congress.

"33. A court is hereby created to be known as the Choctaw and Chickasaw Citizenship Court, the existence of which shall terminate upon the final determination of the suits and proceedings named in the last two preceding sections, but in no event later than the thirty-first day of December, nineteen hundred and three. Said court shall have all authority and power necessary to the hearing and determination of the suits and proceedings so committed to its jurisdiction, including the authority to issue and enforce all requisite writs, process and orders, and to prescribe rules and regulations for the transaction of its business. It shall also have the powers of a Circuit Court of the United States in compiling the production of books, papers and documents, the attendance of witnesses, and in punishing contempt. Except wherein otherwise expressly provided, the pleadings, practice, and proceedings in said court shall conform (as near as may be), to the pleadings, practice and proceedings in equity causes in the Circuit Courts of the United States. The testimony shall be taken in court or

before one of the judges, so far as practicable.) Each judge shall be authorized to grant, in vacation or recess, interlocutory orders and to hear and dispose of interlocutory motions not affecting the substantial merits of the case. Said court shall have a chief judge and two associate judges, a clerk, a stenographer, who shall be deputy clerk, and a bailiff. The judges shall be appointed by the President, by and with the advice and consent of the Senate, and shall each receive a compensation of five thousand dollars per annum, and his necessary and actual traveling and personal expenses while engaged in the performance of his duties. The clerk, stenographer, and bailiff shall be appointed by the judges, or a majority of them, and shall receive the following yearly compensation: Clerk, two thousand four hundred dollars; stenographer, twelve hundred dollars; bailiff, nine hundred dollars. The compensation of all these officers shall be paid by the United States in monthly installments. The moneys to pay said compensation are hereby appropriated, and there is also hereby appropriated the sum of five thousand dollars, or so much thereof as may be necessary, to be expended under the direction of the Secretary of the Interior, to pay such contingent expenses of said court and its officers as to such secretary may seem proper. Said court shall have a seal, shall sit at such place or places in the Choctaw and Chickasaw nations as the judges may designate, and shall hold public sessions, beginning the first Monday in each month, so far as may be practicable or necessary. Each judge and the clerk and deputy clerk shall be authorized to administer oaths. All writs and process issued by said court shall be served by the United States marshal for the district in which the service is to be had. The fees for serving process and the fees of witnesses shall be paid by the party at whose instance such process is issued or such witnesses are subpœnaed, and the rate or amount of such fees shall be the same as is allowed in civil causes in the circuit court of the United States for the western district of Arkansas. No fees shall be

charged by the clerk or other officers of said court. The clerk of the United States court in Indian Territory, having custody and control of the files, papers, and proceedings in the original citizenship cases, shall receive a fee of two dollars and fifty cents for transferring and certifying to the citizenship court the files, papers, and proceedings in each case, without regard to the number of persons whose citizenship is involved therein, and said fee shall be paid by the person applying for such transfer and certification. The judgment of the citizenship court in any or all of the suits or proceedings so committed to its jurisdiction shall be final. All expenses necessary to the proper conduct, on behalf of the nations of the suits and proceedings provided for in this and the two proceeding sections shall be incurred under the direction of the executives of the two nations, and the secretary of the interior is hereby authorized, upon certificate of said executives, to pay such expenses as in his judgment are reasonable and necessary out of any of the joint funds of said nations in the Treasury of the United States."

This treaty and the entire Act of Congress of July 1, 1902, so far as relating to the Choctaw and Chickasaw nations was, in accordance with the provisions contained in said treaty, ratified by a majority of the legal voters of the two Nations at an election held in accordance with the provisions of sections 73 and 74 thereof on September 25, 1902.

The Choctaw and Chickasaw Citizenship Court having been organized, as provided by paragraph 33 of the act, the Choctaw and Chickasaw Nations proceeded under section 31 thereof and filed a bill in equity against J. T. Riddle and nine other persons as representatives of others similarly situated, for the purpose of having all citizenship judgments rendered by the United States Courts in Indian Territory admitting persons

to citizenship or enrollment in the Choctaw and Chickasaw nations annulled, set aside and vacated for the reasons specified in section 31.

The defendants to this test suit and others similarly situated who were made parties thereto, filed answers, all of whom (as appears from the opinion of the Choctaw and Chickasaw Citizenship filed as "Exhibit A" and attached to this brief) admitted that notice was served upon but one of the said nations, and that the citizenship cases appealed from the Dawes Commission were tried *de novo* by the United States Courts, but asserted, notwithstanding, the validity of all such proceedings.

On December 17, 1902, the citizenship court entered its final decree in this test case (attached to this brief and marked "Exhibit B"), in which, after reciting that

"due and legal notice of the pendency and prayer of this suit has been given to the defendants herein, in conformity to law," and that

"said defendants appeared at the hearing hereof, in person and by counsel, and that each and all of said defendants who desired to be heard were heard,"

it was held that notice to each of the Choctaw and Chickasaw Nations of the proceedings in the United States Courts in the Indian Territory, acting under the act of June 10, 1904, admitting persons to citizenship or enrollment as citizens, in those Nations respectively was indispensable and that those courts should not have reviewed such cases *de novo* but should have confined their proceedings to a review of the action of the Dawes Commission upon the papers and evidence submitted to them by the Commission. It was

accordingly ordered, adjudged and decreed, that all of said judgments

"in favor of the ten defendants named in the bill in this proceeding, as well as those who have come in and made themselves parties thereto, and the judgments rendered as aforesaid in favor of all persons similarly situated."

be set aside, annulled and vacated. And those "similarly situated" was the appellant B. C. Hill as appears from his answer, setting out the decree of the Citizenship Court and stating that he has been denied enrollment by the Commission to the Five Civilized Tribes, by reason of such decree:

ARGUMENT.

While there are many minor and subordinate questions in this case, there arises one great and controlling question:

"IS THAT PART OF THE ACT OF CONGRESS APPROVED JULY 1, 1902, CREATING THE CHOCTAW AND CHICKASAW CITIZENSHIP COURT AND GOVERNING ITS JURISDICTION, CONSTITUTIONAL AND VALID; AND ARE THE DECREES OF THAT COURT, RENDERED THEREUNDER, REGULAR AND SHOULD THEY BE ENFORCED?"

This great and controlling question appears to arise and be stated, in the pleadings and arguments, in many forms, but when all are considered it is believed the question, as above stated, includes all and is a fair statement of all.

In our brief filed on behalf of the Choctaw and Chickasaw Nations, in the United States Circuit Court of Appeals for the Eighth Circuit, in addition to our views upon this question, we submitted:

First. That the United States Court in Indian Territory was without jurisdiction to entertain a suit in ejectment on behalf of an Indian allottee for possession of his allotment, on account of that provision contained in the Act of July 1, 1902, specifically directing the Indian Agent by summary order, to put allottee Indians in possession of their allotments, and providing that his action to that end should not be interfered with by the writ of process of any Court; and

Second. That it was the duty of the trial judge to have made the Choctaw and Chickasaw Nations parties to the suit under the provisions of Section 12 of the Act of Congress approved June 28, 1898, entitled:

"An Act for the protection of the people of the Indian Territory and for other purposes (30 Stat. 495), as follows:

"Section 2. That when in the progress of any civil suit, either in law or equity, pending in the United States Court in any district in said Indian Territory, it shall appear to the court that the property of any Indian tribe is in any way affected by the issues being heard, said court is hereby authorized and directed to make such tribe a party to said suit by service upon the Chief or Governor of the tribe, and the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action."

and that because of the failure of the trial judge to act as required by this law, the case should not have been permitted to proceed to final determination.

It was, however, the opinion of the Circuit Court of Appeals upon the first question, that the United States Courts in Indian Territory have jurisdiction of an action of ejectment brought by an Indian allottee against one in possession of his allotment, notwithstanding the summary powers conferred upon the Indian Agent, under the Act of July 1, 1902; and upon the second question as to the interest of the tribes and the propriety of insisting, in the present attitude of the case, that they should have been made parties, the Court held that to be included in the greater and controlling question as follows: "But the lands in controversy here have been allotted to the plaintiffs below. They are no longer the property of the tribes and none of their property can in any way be affected even remotely by this action unless the averments of the answer entitle the defendent to relief. The courts below were of the opinion that they did not, and hence it did not appear to them that any property of the tribes would be affected by the issues in this action. Until their opinions in this regard are overruled it will not so appear, and if they should be, this case must be remanded for testimony and hearing and there will then be ample opportunity for them to consider and determine whether or not the Indian nations should be made parties."

In view, therefore, of these holdings of the Circuit Court of Appeals upon these minor and subordinate questions and of our contention, upon the whole case, that the decisions of the trial and appellate courts upon the great and controlling question as above set out, should be affirmed, we deem it proper to confine our argument thereto; and in doing so we shall include therein such references and answers as we wish

to make to the various contentions of attorneys for plaintiffs in error.

It will appear from an examination of the history of this legislation that the officers of the government are charged with the duty of administering Indian affairs and Congress had become convinced that legislation was necessary in order to protect these Indian wards of the government from fraud and wrong. This conviction took form in the act of Congress of July 1, 1902, and the purpose of Congress is further expressed in paragraph 31 thereof in which the contention of the Nations is stated and the further statement is made that it is desirable to finally determine these questions. In other words Congress, after a careful examination and consideration of the matter and after recommendations by the officers charged with that duty, decided that the establishment of the Choctaw and of the Choctaw and Chickasaw Citizenship Court was necessary and desirable; necessary to do justice to the Nations and desirable from the standpoint of the government, as permitting the administration of the estate of its wards and enabling it to bring to a final and correct conclusion all matters entrusted to its care as guardian.

This was a necessary and proper exercise of the power of Congress. It was necessary to save the Nations from fraud and wrong and Congress had the power to determine what means were necessary to that end.

McCullough vs. Maryland, 4 Wheaton 316-44;
Stephens vs. Cherokee Nation, 174 U. S. 445;
U. S. vs. Kagama, 118 U. S., 375.

And as has been shown, the manner of its exercise is a matter of legislative direction and cannot be controlled by the courts;

Cherokee Nation vs. Hitchcock, 187 U. S. 308.
Lone Wolf vs. Hitchcock, Id 565.

It is contended, however, that the act creating that court is unconstitutional because it is an attempt on the part of the legislative branch of the government to disturb vested rights by setting aside the final decrees of a court of competent jurisdiction.

This has been fully answered by the Circuit Court of Appeals and we set out that part of its opinion in this case which is applicable:

"The Constitution of the United States had been extended over and put into effect in the Indian Territory before the legislation involved in this suit was enacted and counsel for the defendant, Hill, contend that because his judgment of admission to citizenship or March 8, 1898, was by the terms of the act of June 10, 1896, final when it was rendered and he took possession of and improved the land he occupies before June 28, 1898, and because by the act of the latter date, 30 Stat. 498, the right to select this land which was then in his possession as his allotment was granted to him, his right thereto then vested, so that Congress had no power either by direct enactment or by the creation of a commission or court to review or annul his judgment or to deprive him of his right to this allotment. In support of this position they cite *Rutherford* v. *Greenes' heirs*, 2 Wheat. 196; *Gaines* v. *Nicholson*, 9 How. 356; *U. S.* v. *Brooks*, 10 How. 442; *Doe* v. *Wilson*, 23 How. 457; *Crews* v. *Burcham*, 1 Black 352; *Best* v. *Polk*, 18 Wall. 112; *New York Indians* v. *U. S.*, 170 U. S. 1, and *Jones* v. *Meehan*, 175 U. S. 1. The argument is persuasive and it is fortified by the suggestions that the defendant's judgment had been

affirmed by the Supreme Court in 1899 and that the citizenship court was in reality a commission and not a judicial tribunal. But none of the authorities cited contains a decision that one has a vested right in a judgment of citizenship which the legislative department of the United States may not lawfully disturb, although one of the ultimate consequences of such a judgment, if undisturbed, might be an interest in land and other property. The opinions in the cases cited are limited to rulings that grants to designated persons or classes of persons are grants *in praesenti* and that after they have taken effect the rights to the property have vested so that they may not be lawfully destroyed by legislation without compensation. The contention of counsel based upon decisions of this nature fails to give adequate consideration to the origin and character of the defendant's claim, to the nature of the issue determined by his judgment and to the relation of the legislative, executive and judicial departments of the United States to this claim and issue. Prior to the act of June 10, 1896, the right and the power to determine who were the citizens of the Choctaw and Chickasaw nations was vested in those tribes. It was one of the fast-disappearing attributes of the domestic dependent nationality of the Choctaws and Chickasaws, which was vested exclusively in their nations and was guaranteed to them by treaties with the United States. 7 Stat. 333, 334, §4; 11 Stat. 611, 612, art. 8; *Buster* v. *Wright*, 68 C. C. A. 505, 508, 135 Fed. 947, 950. Those nations had rejected the defendant's claim that he was a citizen of the Choctaw nation. That issue had become *res adjudicata* between him and the nations and it was not cognizable by the the judiciary of the United States or of the Indian Territory. No court had any jurisdiction to determine that he was a member of the Choctaw tribe or that he should be admitted to citizenship therein. He was without remedy for the lawful refusal of the Choctaw nation to admit him to citizenship and hence without right to membership in that tribe.

"The United States by its superior might took from the Choctaw and Chickasaw nations the power to determine who their citizens should be, which had been repeatedly guaranteed to them by treaties, and authorized the Dawes Commission and the United States Court in the Indian Territory to decide this issue, by the act of June 10, 1896. Here is the origin of every right of the defendant involved in this action. The maintenance by him of any claim in any court necessarily concedes the power of the legislative department of the Government to create or to revive, and to enforce his demand for citizenship, because without that concession the provisions of the act of June 10, 1896, in this regard, are void and the defendant's claim is conclusively adjudged to be baseless by its rejection by the Choctaw nation. But if the legislative department of the United States had the constitutional power to create or to revive the defendant's claim and to enforce it, it necessarily had the same power to determine whether or not it would revive or enforce it and to select its own method of deciding these questions. It might have determined this issue itself and have declared by direct enactment that the defendant, Hill, was a citizen of the Choctaw nation. It might have empowered a committee, an Indian agent, a commission, a board, or a court, to examine and determine that question on its behalf, and as the determination of this question of citizenship was a purely legislative and administrative function and not a judicial one, Congress necessarily had the authority under the Constitution at any time before an allotment of land under its previous acts had been finally made to the defendant and his right to the land had thereby become vested, to repeal its previous legislation, to change its method of determining the issue, to strike down any decision that had been made under its previous acts, to prescribe a new method of deciding the question or to refuse to determine it altogether and leave the claim of the defendant as it found it, conclusively barred by its rejection by the Choctaw nation.

And also:

"The Act of July 1, 1902, 32 Stat 641, which created the citizenship court and authorized it to review the judgment of the United States Court in the Indian Territory of March 8, 1898, in favor of the defendant, was of the same nature. It was but a modification or an amendment of, or an addition to, the method prescribed by the Legislative department of the Government for the determination of the question whether or not the defendant, Hill, was a citizen of the Choctaw nation by its acts of June 10, 1896, 29 Stat. 340, and July 1, 1898, 30 Stat. 591. When it was passed the Dawes Commission to whom Congress had delegated the power to distribute the lands of the tribes had not allotted the land in dispute to the defendant. He had therefore acquired no vested right in it as against subsequent legislation of the United States because until such an allotment was made all the proceedings determinative of citizenship and of distribution which derived their force and effect from the legislative power of the United States alone were necessarily subject to the further exercise of that authority.

"The fact that the effect of the act of July 1, 1902, has been to avoid final judgments of the United States Courts in the Indian Territory, which had been affirmed by the Supreme Court, has not been disregarded. In the rendition of those judgments, however, those courts were not exercising any of the judicial power of the United States conferred by the third article of the Constitution. They were not constitutional, but legislative courts of the United States, exercising a jurisdiction conferred upon them by Congress by virtue of the sovereignty of the nation and of section 3 of article 4 of the Constitution, which empowers Congress to dispose of, and make all needful rules and regulations respecting the territory belonging to the United States. *American Ins. Co.* v. *Canter*, 1 Pet. 511, 546; *Benner* v. *Porter*, 9 How. 235, 242, 243; *Hornbuckle* v. *Toombs*, 18 Wall. 648, 655; *Good* v. *Martin*, 95 U. S. 90, 98; *Clinton* v. *Englebrecht*, 13 Wall. 434, 447. In the case last

cited Chief Justice Chase, speaking of the courts of the then Territory of Utah, said: "There is no Supreme Court of the United States, nor is there any District Court of the United States, in the sense of the constitu- in the Territory of Utah." Now, as the power conferred upon the courts in the Indian Territory and upon the Supreme Court respecting the decision of the question who were citizens of the Indian tribes, was purely legislative and administrative and the entire question still remained subject to congressional action, the legislative department had the same power at any time before allotments were made and the rights of allottees became vested, to disregard or to authorize a review of the decisions of these courts by other tribunals that it would have had to have disregarded or reviewed the decisions of an Indian agent, a commission, or a committee, if it had conferred this power upon them. The decisions, of the Supreme Court in *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 488, and *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 306, adequately sustain this conclusion. In the former case that court expressly decided that the defendant and others who had secured judgments of admission to citizenship, under the act of June 10, 1896, which were final under the legislation in existence when they were rendered, had no vested rights therein or in the lands or property of the tribes to which these judgments would have entitled them, that the subsequent act of July 1, 1898, which gave to the tribes appeals to the Supreme Court from these judgments was constitutional and declared that "the lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion of any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms." Earlier decisions of that court are to the effect that the legislative department of the Government has ample power by subsequent enactment to grant a new trial or a review by a suitable tribunal of judgments final under the laws in force

when they were rendered. *Sampeyreac* v. *U. S.*, 7 Pet. 222, 235; *Freeborn* v. *Smith*, 2 Wall. 160; *Garrison* v. *New York*, 21 Wall. 196, 204; *Freeland* v. *Williams*, 131 U. S. 405, 412; *Essex Public Road Board* v. *Skinkle*, 140 U. S. 334."

It is also contended that the plaintiff in error Hill is secure in his rights of citizenship and property because the act of 1898 provided that the lands of the tribes should be allotted among the members of the Choctaw and Chickasaw Nations, and his decree of citizenship rendered by the United States Court for the Southern District of the Indian Territory was in force at that time. Attorney for plaintiff in error, in insisting upon this contention seems to overlook the fact that the very law upon which he expresses a willingness to rely, provides, in terms, that the officers of the government shall determine who are Indians and who shall participate in allotment and distribution of tribal property. So it would seem that there is little of advantage to him in referring to the law, since its acceptance by him would carry with it an acceptance of the power of the government to enroll or deny enrollment to all who claim to be entitled to participate.

To adopt the view urged by the plaintiff in error would be to reach the conclusion that because Congress had employed a particular vehicle, the United States Courts in Indian Territory for instance, as a means to enable it to justly and correctly administer this estate that although such action might result in great wrong to the Indians, that Congress would have no power to remedy the wrong thus unwittingly done. The mere statement of the proposition demonstrates the incorrectness of the reasoning. Congress is clothed with

plenary power over these Indian affairs, and in fact it is the sole foundation and source of power in regard to them. It is their guardian and charged with all the duties of a guardian to its wards and this is now so well established that the citation of authorities is not necessary to support the proposition. Let us suppose that Congress instead of vesting the Dawes Commission with jurisdiction to determine citizenship and granting a transfer of the proceedings (denominated appeal for want of a better term), from it to the United States Courts for the Indian Territory, had chosen to inform itself in some other way as to who were citizens of the Choctaw and Chickasaw Nations and had passed an act enumerating the citizens of these nations and stated that they were the only ones entitled to participate in the distribution of the tribal property. Could it be contended for a moment that persons could acquire such a vested right under such an act as to preclude Congress from taking their names from such rolls if it afterward developed that a mistake had been made in placing their names thereon. No one would maintain such a proposition for a moment, yet it might be maintained with as much logic and as much force as the proposition advanced by counsel here. Viewed in the proper light Congress is no more bound when convinced of wrong such as those shown in these cases to let an act of the Commission or the Court stand without further investigation than it would be by its own act. Congress not only has the power but it is clothed with the duty of taking whatever steps seem proper and right to it to insure a fair and just administration of this estate.

Upon this point, however, the language of the court in Stephens vs. Cherokee Nation (174 U. S. 477-478),

cited and largely relied on by the Circuit Court of Appeals in this case, would seem to be conclusive.

"The contention is that the act of July 1, 1898, in extending the remedy by appeal to this court was invalid because retrospective, an invasion of the judicial domain, and destructive of vested rights. By its terms the act was to operate retrospectively, and as to that it may be observed that while the general rule is that statutes should be so construed as to give them only prospective operation, yet where the language expresses a contrary intention in unequivocal terms the mere fact that the legislation is retroactive does not necessarily render it void.

"And while it is undoubtedly true that legislatures cannot set aside the judgment of courts, compel them to grant new trials, order the discharge of offenders, or direct what steps shall be taken in the progress of judicial inquiry, the grant of a new remedy by way of review has been often sustained under particular circumstances. (Calder v. Bull, 3 Dallas, 386; Sampeyreac v. United States, 7 Pet., 222; Freeborn v. Smith, 2 Wall., 160; Freeland v. Williams, 131 U. S., 405; Essex Public Board v. Skinkle, 140 U. S., 334.)

"The United States Court in Indian Territory is a legislative court and was authorized to exercise jurisdiction in these citizenship cases as a part of its machinery devised by Congress in the discharge of its duties in respect of these Indian tribes, and assuming that Congress possesses plenary power of legislation in regard to them, subject only to the Constitution of the United States, it follows that the validity of remedial legislation of this sort cannot be questioned unless in violation of some prohibition of that instrument.

"In its enactment Congress has not attempted to interfere in any way with the judicial department of the Government, nor can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments

from review, and the mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of a lower court beyond the power of re-examination by a higher court, though subsequently authorized by general law to exercise jurisdiction."

(See also Cherokee Nation v. Hitchcock and Lone Wolf v. Hitchcock, supra.)

It is further contended by the Attorney for plaintiff in error that the Citizenship Court, in holding that both Nations were necessary parties in the original proceedings before the Commission and the United States Courts and that the action of such United States Courts should have been confined to a review of the proceedings before the Commission and should not have extended to a trial of the cases *de novo*, held the act of 1896 void and thus sought to overrule the Supreme Court of the United States, in the Stephens case.

Such a conclusion cannot be reached with any degree of reason. The fact that the original proceedings under the law of 1896 were held to be void was through no fault or weakness of the law. The fatal defect as to parties arose out of the failure of the citizenship applicants themselves to join the necessary parties in interest, the Choctaw and Chickasaw Nations. The fatal defect as to the erroneous trial of the cases *de novo* arose out of the erroneous construction placed upon the act by the United States Courts. If the applicants by whom the acts were instituted had joined and served the necessary parties and if the United States Courts

had confined their action to a review of the proceedings had before the Commission, the decision of the Citizenship Court, as to the regularity of the proceedings under the law of 1896, would certainly have been otherwise.

An examination of the Stephens case cited above will show that it was confined entirely to a determination of the constitutionality of the legislation by Congress in respect to citizenship and the allotment of lands in the Indian Territory. It assumes, *without determining*, that the act of June 10, 1896, authorized the United States Courts to review *de novo* the cases appealed from the Dawes Commission. The authority of the Congress to authorize such a review was confirmed, and the legislation declared to be, in general, valid and constitutional. The question of notice was not even mentioned in the opinion in that case and the act of July 1, 1902, therefore, which provided for a specific inquiry by the Citizenship Court into the validity of the methods of procedure adopted by the United States Courts in the citizenship cases and for a review of such cases upon their merits, in no way affects the judgment in the Stephens case. In fact, it but supplements the action of the court in that case and serves to complete the purpose of Congress manifested through its legislative act to have the "very right" of the controversy determined.

Various other contentions are made on behalf of the plaintiff in error, which we shall briefly notice, since they all bear upon the great and controlling question in the case herein discussed.

It is urged that the answer of Hill, the defendant in the trial Court, alleges that he was not made a party to the test suit before the Citizenship Court,

known as the Riddle case; that the plaintiffs filed a demurrer to this answer, thus conceding the statements of fact contained in it and that it is thus established in this case, that Hill was not a party to said test suit and that he should not be affected by the decree therein rendered. The weakness of this contention is made plain when it is understood that the answer referred to, to which a demurrer was filed, contains other facts which show conclusively that he was made a party to such suit. It sets out the decree of the Citizenship Court in the Riddle case (which also appears appended to this brief and marked "Exhibit B") in which the Court finds

"* * that due and legal notice of the pendency and prayer of this suit has been given to the defendants herein in conformity of law."

And it is also alleged in said answer that

"* * the said Commission to the Five Civilized Tribes refused and has ever since refused and still refuses, to enroll this defendant as a member of said tribe of Indians, claiming that the 'pretended decree' of the so-called 'Choctaw and Chickasaw Citizenship Court' vacated and annulled the decree of the United States Court for the Southern District of the Indian Territory, declaring this claimant to be a member of the Choctaw tribe of Indians."

It will be remembered that the test suit was, as required by the law against ten persons for themselves and as representing all other persons "similarly situated," that is, all persons whose citizenship cases were passed upon by the United States Courts for the Central and Southern Districts of the Indian Territory, under the Act of June 10, 1896.

The Circuit Court of Appeals takes into consideration this phase of the case and that part of its opinion thereon, is as follows:

"Finally counsel for defendant insist that he is not bound by the decree of the citizenship court (1) because he was not one of the ten persons named as defendants therein, but as Congress had plenary power to directly reverse the judgments of citizenship or to determine in what way they should be reversed, its enactment that the ten persons should stand as the representatives of all others similarly situated was not ineffective; (2) because there was no proof in the citizenship court, and there is no finding in the decree that he was one of the persons similarly situated with the ten defendants named, but the decree avoids all the judgments of the courts in the Indian Territory whereby in cases appealed from the decisions of the Dawes Commission under the act of June 10, 1896, any of the defendants named or any of the persons similarly situated was adjudged a citizen of the Choctaw or Chickasaw nation and the answer of the defendant in this action that upon such an appeal he secured a judgment of one of those courts that he was a citizen of the Choctaw nation sufficiently discloses the fact that he was similarly situated with the ten defendants named in the decree of the citizenship court and brings him clearly within its terms; (3) because the act of 1902 required that notice of the pendency in the citizenship court of the suit there brought and of the time for answering the bill should be published for four weeks in two newspapers generally circulating in the Choctaw and Chickasaw nations thirty days before the time for answering the bill expired, and the decree does not recite or adjudge that this notice was published (32 Stat. 647), but the ten defendants are named in the title of the decree as defendants "for themselves and as representatives of all persons similarly situated, claiming to be members of the Choctaw and Chickasaw nations, by virtue of alleged decrees of

the United States Court for the Central and Southern Districts of the Indian Territory sitting respectively at South McAlester and Ardmore, and commonly known as Court Claimants," the decree recites: "The court finds that due and legal notice of the pendency and prayer of this suit has been given to the defendants herein in conformity of law" and it adjudges that the judgments in favor of those similarly situated as well as the judgments in favor of the ten defendants named and in favor of other defendants who appeared be annulled.

"Counsel concede that the recital in the decree that the notice had been given "in conformity of law" is sufficient in the absence of any inconsistent record or evidence to raise the presumption of the legal publication of the notice and of the jurisdiction of the court over the persons of all who are effected by the decree (*Applegate* v. *Lexington & Min. Co.*, 117 U. S. 255, 269; *Foster* v. *Givens*, 14 C. C. A. 625, 632, 67 Fed. 684, 691; *Beattie* v. *Wilkinson*, 36 Fed. 646; *Rumfelt* v. *O'Brien*, 57 Mo. 569, 572; *Harris* v. *Lester*, 80 Ill. 307, 315; *Mulvey* v. *Gibbons*, 87 Ill. 367, 380; 17 Am. & Eng. Enc. of Law 1082) were it not for the fact that this recital is limited by the words "the defendants herein," but they insist that these words refer to the ten defendants whose names are written in the title of the decree and to them alone. Such a construction, however, is inconsistent with the decree against those similarly situated which could have been lawfully rendered only in case the publication of the notice had been made, and the words "the defendants herein" must therefore be given a broader interpretation and must include those who were similarly situated as well as those whose names were written in the title of the decree.

"The defendant pleaded the decree of the citizenship court in his answer and took upon himself the burden of showing by adequate averments why it did not estop him from asserting that he was a citizen of the Choctaw

nation. He alleged, it is true, that he was not similarly situated with the defendants named in that decree, but he failed to set forth any difference between his situation and that of the ten defendants there named, while his answer disclosed the fact that he had secured a like judgment upon a similar appeal. He alleged, it is true, that he was not a party to the suit in the citizenship court, and that no notice was ever served upon him therein, but he failed to allege that the notice of the pendency of that action was not published in the manner directed by the act of Congress. These averments were insufficient to withdraw the defendant from the estoppel of the decree, and the judgments of the courts in the Indian Territory against him in the action now under consideration must be affirmed."

A further contention is that if the Choctaw and Chickasaw Citizenship Court is not a Court, in the Constitutional sense, it has no power to enforce its decrees and that they are, therefore, not enforcible, and that they may be observed or not as the Commission to the Five Civilized Tribes or the Secretary of the Interior may see fit. That contention is merely the result of the unwillingness of counsel to accept the reasoning of this Court in the Stephens case or of the Circuit Court of Appeals in this case. The Citizenship Court was created by Congress and directed to do certain things in a certain way defined by the law. It could do what the law directed and no more and no less. It was provided that its decisions should be final and in the laws governing the jurisdiction of the Commission and the Secretary of the Interior, in making up the final citizenship rolls are required to enroll such persons as lawfully and rightfully appear upon the tribal rolls and such others as have been duly and lawfully admitted to citizenship. These means Congress saw fit to adopt for carrying out this work and

it is difficult to understand how it can be urged that, instead of this procedure, Congress ought to have adopted some other procedure for the enforcement of these decrees.

Counsel for plaintiff in error, in his criticism of the holding of the Circuit Court of Appeals says that he settlement of these citizenship cases is a legislative and not a judicial matter, calls attention to the decision of this Court in the Stephens case, under the act of July 1, 1898, and inquires with considerable vehemence if, in that case, the Supreme Court was exercising a legislative and not a judicial function.

In that case and under that law the Supreme Court in the exercise of its jurisdiction, followed the law—no more and no less. The law said the decision should be confined to the constitutionality and validity of certain legislation. The jurisdiction conferred by the act had no relation to or connection with, the functions of the court in a constitutional sense; and there has been and will be no disposition upon the part of Congress or the Nations, to question the correctness of the Court's decision in the Stephens case. The determining element in the Stephens case and this case, seems to be persistently overlooked, by counsel for plaintiff in error. It is not a question of drawing nice distinctions as to whether the powers exercised by the various tribunals are judicial or not; but the real question is as to the existence or non-existence of vested rights. This Court decided in the Stephens case that citizenship applicants were not in the enjoyment of such vested rights as precluded an inquiry into their status, in pursuance of subsequent legislation. That is the determining element, likewise in this case, and the decision of the Circuit Court of

Appeals bears this constantly in mind and reaches its conclusions in the light of this Court's decision in the Stephens case.

It appears to us to be clear that Congress has not exceeded its powers and that the legislation is valid and constitutional, and that the proceedings of the Citizenship Court thereunder are regular and that they should be enforced. If there should be, however, a doubt as to its validity, that would not, we submit, be sufficient to justify this court in declaring it unconstitutional. The doubt would be resolved in favor of its constitutionality.

Cooley's Constitutional Limitations, 6th Ed., 216–217, and authorities there cited.

In the case of Fletcher v. Peck, 6th Cranch, 87, 128, Chief Justice Marshall rendering the opinion of the Court said:

"The question whether a law to be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court when impelled by duty to render such a judgment would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

Upon this point Mr. Cooley uses the following language (Cooley's Constitutional Limitations, 6th Edition, page 217):

"The constitutionality of a law, then, is to be presumed, because the legislature, which was first required to pass upon the question, acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid by the Constitution upon their action, have adjudged that it is so. They are a coördinate department of the Government with the judiciary, invested with very high and responsible duties, as to some of which their acts are not subject to judicial scrutiny, and they legislate under the solemnity of an official oath, which it is not to be supposed they will disregard. It must, therefore, be supposed that their own doubts of the constitutionality of their action have been deliberately resolved in its favor, so that the courts may with some confidence repose upon their conclusions, as one based upon their best judgment."

In this case however, it appears that the legislation has been carefully considered by Congress, that the need for such legislation was fully recognized and that it embraced a deliberate conclusion of a co-ordinate branch of the Government which is entitled to great weight by the courts.

McCullough v. Maryland, 4 Wheaton, 316, 423.

It is held that the courts will not inquire as to whether a given measure was necessary to be passed by Congress and in United States vs. Des Moines Navigation and Railway Company (142 U. S. 510, 544), the Court, after quoting from Cooley's Constitutional Limitations, 5th Edition, 222, lays down the rule that in all cases where it appears that Congress had the power to legislate, the courts are not at liberty to inquire into the proper exercise of the power but will assume that it has been properly exercised. To the same effect is Angle v. Chicago, St. Paul, etc.,

Railway Co., 151 U. S., 1, 18; Lindsey and Phelps Co. v. Mullen, 176 U. S., 126, 146; Luther v. Borden, 7th Howard 1, 47; Taylor and Marshall v. Beckham, 178 U. S., 548, 580.

It is therefore respectfully submitted that Sections 31, 32 and 33 of the Act of Congress approved July 1, 1902, creating the Choctaw and Chickasaw Citizenship Court, and defining its jurisdiction, are constitutional and valid; and that the decrees of that court, rendered thereunder, are regular and should be enforced, and that the decisions of the trial and Appellate Courts should be affirmed.

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THE CHICKASAW NATION.

EXHIBIT A.

IN THE
CHOCTAW AND CHICKASAW CITIZENSHIP
COURT
Sitting at
SOUTH McALESTER,
IN THE INDIAN TERRITORY.
December Term, 1902.

The Choctaw and Chickasaw Nations, or Tribes of Indians, Plaintiffs,

vs.

J. T. Riddle et al., Defendants.

This is a proceeding instituted in this Court by the Choctaw and Chickasaw Nations, or tribes of Indians, against the defendant, J. T. Riddle, and nine others, who are similarly situated. The plaintiffs filed a Bill in Equity in this Court, by virtue of Section 31, of an Act entitled "An Act to Ratify and Confirm an Agreement with the Choctaw and Chickasaw Tribes of Indians, and for other purposes," approved July 1, 1902, said section being as follows:

"It being claimed and insisted by the Choctaw and Chickasaw Nations that the United States Courts in

the Indian Territory, acting under an Act of Congress, approved June 10, 1896, have admitted persons to citizenship, or to enrollment as such citizens, in the Choctaw and Chickasaw Nations, respectively, without notice of the proceedings in such Courts being given to each of said nations; and it being insisted by said nations that, in such proceedings, notice to each of said nations was indispensable, and it being claimed and insisted by said nations that the proceedings in the United States Courts in the Indian Territory, under said act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commission, and should not have extended to a trial *de novo* of the question of citizenship; and it being desirable to finally determine these questions, the two nations, jointly or either of said nations acting separately, and making the other party a party defendant, may, within ninety days after this agreement becomes effective, by a bill in equity filed in the Choctaw and Chickasaw Citizenship Court, hereinafter named, seek the annulment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship, or enrollment by said courts, with notice to one but not to both of said nations, shall be made defendants to said suit, as representatives of the entire class of persons similarly situated, the number of such persons being too numerous to require all of them to be made individual parties to the suit; but any person so situated may, upon his application, be made a party defendant to the suit. Notice of the institution of said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant as aforesaid, and upon each of the ten representative defendants, and shall also be published for a period of four weeks in at least two weekly newspapers having general circulation in the Choctaw and Chickasaw Nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering same, which shall not be less

than thirty days after the last publication. Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizenship or enrollment by said United States Courts in the Indian Territory, was wrongfully obtained as provided by the next section. In the event said citizenship judgments, or decisions, are annulled or vacated in the test suit hereinbefore authorized, because of either or both irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers and proceedings in any citizenship case in which the judgment or decision is so annulled or vacated, shall, upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said citizenship court by the court having custody and control of such files, papers and proceedings, and, upon the filing in such citizenship court of the files, papers and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein."

The plaintiffs, after setting out in their bill that certain lands, situated in the Indian Territory, and embracing that portion known as the Choctaw and Chickasaw Nations, as belonging to these two tribes and that by virtue of treaty stipulations heretofore entered into on the part of the United States and these two

tribes of Indians, said lands are held in common by the members of these two tribes, and they further allege that these ten defendants, and several thousands of others similarly situated, have been admitted and placed upon the rolls of these two nations as Indian citizens, by virtue of certain alleged judgments or decrees of the United States Courts, for the Central and Southern Districts of the Indian Territory, under the Act of Congress approved on the 10th day of June, 1896; and by virtue of these said judgments these defendants, and all those similarly situated, are insisting upon enforcing said alleged judgments or decrees and if same are enforced by allotment to them of an equal share of the lands and moneys of said tribes, it will wrongfully deprive the members thereof of property to the value of many millions of dollars, and thereby proportionately decrease the share which each member would otherwise receive.

The plaintiffs further allege, that all of the judgments of the said United States Courts in the Indian Territory, acting under the Act of Congress approved June 10, 1896, are illegal and void; that no valid judgments, affecting said lands and moneys, could in any event have been rendered without notice to both of said nations, or tribes; and further allege, that in no case in which judgments were rendered purporting to admit any of said defendants to citizenship in either of said nations or tribes, was notice given of the pendency of said proceedings to each of said nations or tribes, and that in no case was judgment taken against both of said nations, or tribes; and, that due and lawful notice to each of said nations or tribes, was indispensable to the rendition of valid judgments. Plaintiffs further allege, that the proceedings in the United

States Courts in the Indian Territory, under said Act of Congress, approved June 10, 1896, in the rendition of said alleged decrees, should have been confined to a mere review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commission, and that said court should not have tried the cases *de novo*, and that the action of said courts in trying said cases *de novo*, and in rendering the alleged judgments, was illegal and void; and that all of said evidence of a documentary nature, which has become a part of the record of said cases, was unlawfully taken, and that for that reason all of said proceedings are of no force and effect. Plaintiffs further allege, that they have no adequate remedy at law by which they can redress the great wrong threatened them, and they, therefore, pray this court to enter its decree, declaring all such judgments rendered by the United States Courts in the Indian Territory, acting under the Act of Congress approved June 10, 1896, illegal and void; and ask this court to declare the proceedings of said court in trying said cases *de novo* in which said judgments were rendered upon appeal from the Commission to the Five Civilized Tribes, illegal and void, and of no force and effect, etc. The plaintiffs further attach to their bill in equity a judgment rendered by the United States Court for the Central District of the Indian Territory, in the case of Elizabeth Casey et al, against the Choctaw Nation, a party who obtained judgment under the Act of June 10, 1896. The attachment is marked exhibit "A," and they ask that it be taken as a part of their complaint, as bearing out their contention that only one nation was served with notice, and that the judgments were taken against one nation alone.

This judgment is as follows:

EXHIBIT A.

Copy of Order of Court.

United States of America,
Indian Territory,
Central District.—ss.

In the United States Court in the Indian Territory, Central District, at a term thereof begun and held at South McAlester, in the Indian Territory, on the 24th day of August, A. D., 1897, present, the Honorable Wm. H. H. Clayton, Judge of said Court. The following order was made and entered of record, to wit:

25.

ELIZABETH CASEY, ET AL.

vs.

CHOCTAW NATION.

Judgment.

On this 24th day of August, 1897, this cause came on to be heard upon the pleadings and evidence produced herein, and the Court being well and sufficently advised in the premises, doth find as follows:

That Elizabeth Casey, aged 58 years; her son, John Casey, aged 25 years; her son, Joshua Casey, aged 23 years; her daughter, Phebe Garrett, aged 37 years; her grandson, Wm. Garrett, aged 19 years; her grandson, John Garrett, aged 16 years; her grandson, Jesse Garrett, aged 12 years; her granddaughter, Dora Garrett Cheatam, aged 17 years; her granddaughter, Mandy Garrett, aged four years; her great-granddaughter, Venice Cheatam, aged 1 year; her grand-

daughter, John Ann Casey, aged 16 years, are Choctaw Indians by blood and have been born and reared in the Choctaw Nation, and are citizens and residents of the Choctaw Nation, and that all of said persons are entitled to be enrolled on the citizenship roll of the Choctaw Nation, and as such citizens they and each of them are entitled to all the rights, privileges, benefits and immunities of Choctaw citizens of said Choctaw Nation, and all such rights and privileges are hereby decreed to them.

It is further ordered and adjudged by the Court that the decision of the Commission to the Five Civilized Tribes of Indians, by which the application of the parties appellant was denied, and from which decision these appellants appealed as provided by law, be and the same is hereby reversed, and it is ordered by the Court that said Commission shall put the names of these appellants on the rolls prepared or to be prepared by it, of citizens of the Choctaw Nation by blood.

It is further ordered by the Court that the Clerk of this Court transmit under his official seal to the said Commission for the Five Civilized Tribes of Indians a true copy of this judgment, which said certified copy shall operate and be taken as a mandate from this Court to said commission.

It is further ordered and adjudged by the Court that these appellants have and recover of and from the Choctaw Nation all their costs in this behalf expended.

(Endorsements.)

The within is a true copy from the record of an order made by said Court on the 24th day of August, A. D., 1897.

(Signed.) E. J. FANNIN, Clerk.

Filed September 6, 1897.

H. M. JACOWAY, Secretary.

No. 75-2.

No. 25—E. Casey et al. vs. Choctaw Nation. Copy of Order of Cou t.

MUSKOGEE, I. T., *Sept.* 24, 1902.

I, Tams Bixby, Acting Chairman of the Commission to the Five Civilized Tribes, do hereby certify the foregoing to be a true and correct copy of a certified copy of an order made by the United States Court in Indian Territory, Central District, South McAlester, I. T., on the 24th day of August, A. D. 1897, in the case of Elizabeth Casey, et al. vs. Choctaw Nation No. 25, as the same appears on file with the records of the Commission to the Five Civilized Tribes.

TAMS BIXBY,
Acting Chairman.

Defendants filed an answer to the plaintiff's bill in equity, in which they admit the judgments described in said bill in equity, were rendered by the Courts mentioned in said bill in equity, under and by virtue of the Act of Congress approved June 10, 1896, but deny that said judgments are illegal and void. They admit that only one nation was served and that the judgments were taken against only one nation, but insist that both of said nations were not necessary parties and that it was not necessary to serve notice of the pendency of said suits, or the notice of application for such citizenship presented to the Commission of the United States to the Five Civilized Tribes, from which appeal was taken to the said Court.

Defendants further insist, that under and by virtue of the Act, approved June 10, 1896, and all other other laws and treaties between the Choctaw and Chickasaw Nations, or Tribes of Indians, that no notice was necessary to have been given to have prosecuted the

application of the defendants for citizenship, and that no judgment against both of said nations was necessary and proper, under the law, to recognize the rights of these defendants in and to citizenship of status recognized or established by virtue of said judgments.

And in answering the other allegations in the bill in equity, the defendants admit that the United States Courts for the Central and Southern Districts of the Indian Territory, rendering such judgments under the Act of June 10, 1896, tried the cases *de novo*, upon an appeal from the Commission to the Five Civilized Tribes, known as the Dawes Commission; but insist that that was the manner in which they should be tried, and deny that said judgments, by reason of the fact that said court heard evidence in addition to that heard before said Commission and tried said cases *de novo*, are irregular and illegal and deny that such trials *de novo* rendered such judgments void, as alleged in said bill in equity. The defendants admit the material facts alleged in the plaintiff's bill, but insist that upon the facts as alleged, these are valid judgments. They contend in their pleadings, as well as in their arguments that under the Act of June 10, 1896, authorizing the Dawes Commission to hear and determine the application of all persons who might apply to them for citizenship in said nations, it was necessary to give but one nation notice, and that the trials should have been had *de novo*, as they were had, before the United States Courts.

By virtue of the provision of Section 31 of the Act of July 1, 1902, Polly Hill and numerous other parties, who claim that they are similarly situated to the ten defendants named in the original bill, upon their application, were made parties to this proceeding, all of

them filing answers to the bill, and, as I understand, admit in their several answers that notice was not served on but one nation, and that the trials in the United States Court for the Indian Territory, upon appeal from the Commission to the Five Civilized Tribes, were *de novo*.

The attorneys representing the plaintiffs and the attorneys representing the defendants in the original action, as well as those attorneys who represent parties who are similarly situated and in consequence thereof, came in and made themselves party defendants, filed in this Court the following stipulation:

In the Choctaw and Chickasaw Citizenship Court, sitting at South McAlester, December Term 1902.

The Choctaw and Chickasaw Nations or tribes of Indians, Plaintiffs,

vs.

J. T. Riddle, et. al., Defendants.

Stipulation.

Come now the plaintiffs, the Choctaw and Chickasaw Nations by Mansfield, McMurray & Cornish, their attorneys, and comes J. T. Riddle and nine other representative defendants, named in the bill of plaintiff herein, as representatives of all other persons similarly situated by C. B. Stuart, C. C. Potter, J. G. Ralls, W. A. Ledbetter, A. C. Cruse, Thomas Norman, J. C. Thompson, Sylvester Mullen, C. L. Herbert, and Charles McPherren, their attorneys, and file this their stipulation, agreeing that this Court may consider as before the Court for consideration, the Constitution of the Choctaw and Chickasaw Nations or Tribes of Indians and all their printed laws passed by their legislatures or General Councils from time to time,

together with all treaties made and entered into by said tribes with the United States of America and the Rules of the Commission to the Five Civilized Tribes in 1896. This stipulation, however, shall not be taken as an admission of either party, plaintiff or defendant, as to the validity of any of said Constitutions, or legislative acts of the Choctaw or Chickasaw Nations, or of any of the treaties aforesaid, it being intended that all proper exceptions to the legality of any of said matters so judicially taken notice of, shall be open for argument and discussion by either party.

Attorneys for Plaintiffs:

Mansfield, McMurray and Cornish.

Attorneys for defendants:

C. B. Stuart, A. C. Cruse, W. A. Ledbetter, C. L. Herbert. C. C. Potter, J. G. Ralls, Chas. S. McPherren, T. W. Neal, Warner & Buckley, Harley & Lewis, Thomas Norman, J. C. Thompson and Sylvester Mullen.

Opinion by Adams, C. J.

It will be seen by reference to Section 31 of the said Act set out in the statement of the case, that so far as this suit is concerned, this Court is limited to the consideration of two legal propositions and two alone, and it is expressly confined to these two propositions, to wit: Whether, under the Act of Congress, approved June 10, 1896, notice to each of said nations was indispensable; and second, whether or not the proceedings had in the United States Courts, in the Indian Territory under said Act of June 10, 1906, should have been confined to a review of the acts of the Commission to the

Five Civilized Tribes upon the papers and evidence submitted to such commission. The pleadings and arguments admit there was but one nation served with notice, and also that the trials were *de novo*. Then we come to the consideration of the questions, was it indispensable under the Act of June 10, 1896, to give both nations notice, and should the trials have been *de novo*, or confined to a review of the action of the Dawes Commission?

We will take these questions up in order in which they come.

First: Was notice, under the Act of June 10, 1896, indispensable? That is the issue plainly stated. To arrive at an intelligent conclusion of ths matter, we deem it right and proper, in considering the meaning of the Act of June 10, 1896, to consider why this Act was passed. What wrongs did Congress intend to correct, if any? And what remedies, if any, it sought to apply? In considering this we shall look at the legislation that Congress had enacted prior to that time upon this subject, for the purpose of determining why the Act of June 10, 1896, was passed, and also what these judgments that were obtained under this said Act conferred. What were they dealing with? We shall also take into consideration, in determining these matters as to whether these nations both should have been parties, what rights these judgments conferred, and whether, as a consequence of these judgments, the parties who obtained them were entitled to such rights in the property belonging to both nations as would require notice to both nations, in dealing with their property.

On March 3, 1893, Congress of the United States passed an Act authorizing the President to nominate

and by and with the consent of the Senate, to appoint three Commissioners to enter into negotiations with the Cherokee Nation, the Choctaw and Chickasaw Nations, the Muskogee or Creek Nation, and the Seminole Nation for the purpose of extinguishment of the national or tribal title to any land within the Territory now held by any or all of said nations, or tribes, either by the cession of same, or some part thereof, to the United States, or by the allotment and division of the same in severalty among the several nations, or tribes, respectively, as might be entitled to the same; or by such other method as might be agreed upon between the several nations, or tribes, aforesaid, or each of them, and the United States, with a view of such adjustment upon a basis of justice and equity, as might, with the consent of said nations or tribes of Indians, so far as might be necessary, be requisite and suitable to enable the ultimate creation of a state of the Union, which shall embrace the lands within said Indian Territory. In the Act, Congress declared the purpose of creating this Commission, and to carry out this purpose, it enacted that such Commission, under such regulations and directions as should be prescribed by the President, through the Secretary of the Interior, should open negotiations with the several nations of Indians, as aforesaid, in the Indian Territory, and should endeavor to procure—First, such allotment of lands in severalty to the Indians belonging to each of the said nations, tribes or bands, respectively, as may be agreed upon as just and proper, and to provide for each of said Indians a sufficient quantity of lands for his or her needs, in such equal distribution and apportionment, as may be suited to the circumstances, under the terms of said agreement. Second, to procure the cession,

on such terms as shall be agreed upon, of lands not found necessary to be allotted or divided, to the United States. Congress further provided in this same Act, that the Commissioners—meaning the Dawes Commission—should, from time to time, report to the Secretary of the Interior the progress of its negotiations.

So we are at once to conclude that the purpose of this Act was to send three disinterested persons here as representatives of the Government, to negotiate with these five tribes and get them to agree, if they could, to an allotment of these lands, so that each Indian would hold his share in severalty, and thereby have a home; and with the ultimate result of creating a state.

This was the purpose, for Congress has stated as much in the Act. We have a right to assume these Commissioners discharged their duty; that they came here and attempted to negotiate with the Five Tribes and made their report to the Secretary of the Interior as they were directed. We find in the statement of the case of Stephens et als. vs. Cherokee Nation, which is found in the 174th U. S., page 445, that the Dawes Commission did make reports to the Secretary of the Interior from time to time. On November 20, 1894, and November 18, 1895, the Commission made reports to Congress of the condition of affairs in the Indian Territory, in respect of the manner in which lands were held by the members of the tribes, and the manner in which citizenship of both tribes was dealt with, finding a deplorable state of affairs, and the general prevalence of misrule.

In the report of November, 1895, the Commission, among other things, said:

"It cannot be possible that in any portion of this country government, no matter what its origin, can remain peaceable for any length of time in the hands of one-fifth of the people subject to its laws. Sooner or later violence, if nothing else, will put an end to a state of affairs so abhorrent to the spirit of our institutions. But these governments are of our own creation, and rest for their very being on authority granted by the United States, who are, therefore, responsible for their character. It is bound by constitutional obligations to see to it that government everywhere within its jurisdiction rests on the consent of the governed. There is already painful evidence that in some parts of the territory this attempt of a faction to dictate terms to the whole has already reached its limit and if left without interference will break out in revolution."

And the Commission, after referring to tribal legislation in the Choctaw and Cherokee tribes bearing on citizenship and the manipulation of the rolls and procedure in Indian tribunals, said:

"The Commission is of the opinion that if citizenship is left without control or interference, to the absolute determination of the tribal authorities, with power to decitizenize at will, great injustice will be perpetrated and many good and law-abiding citizens reduced to beggary. And, further, the Commission is compelled to report: that so long as power in these nations remains in the hands of those now exercising it, further efforts to induce them by negotiations to voluntarily agree upon a change that will restore to the people the benefit of tribal property, and that security and order and government enjoyed by the people of the United States, will be in vain."

We have a right to assume that Congress, in view of these official reports that had just been made to it, with all of these conditions in mind, and also with the purpose of allotting these lands, by passing such legis-

lation as would insure rights to those who were entitled to same, passed the Act of June 10, 1896, which is as follows:

ACT OF JUNE 10, 1896.

For salaries and expenses of the Commissioners appointed under Act of Congress, approved March 3, 1893, to negotiate with the Five Civilized Tribes in the Indian Territory, the sum of forty thousand dollars, to be immediately available; and said Commission is directed to continue the exercise on the authority already conferred upon them by law, and endeavor to accomplish the objects heretofore prescribed to them, and to report from time to time to Congress.

That said Commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after hearing they shall determine the right of said applicant to be so admitted and enrolled: *Provided, however*, that such an application shall be made to such Commissioners within three months after the passage of this Act. The said Commission shall decide all such applications within ninety days after the same shall be made. That in determining all such applications said Commission shall respect all laws of the several nations or tribes not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes; and shall give due force and effect to the rolls, usages and customs of each of said nation or tribe; and, provided further, that the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes, and whose rights thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this Act desire such citizenship may apply to the legally constituted court or committee designated by the several tribes for such citizenship,

and such court or committee shall determine such application within thirty days from the date thereof.

In the performance of such duties said Commission shall have power and authority to administer oaths, to issue process for, and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever, heretofore taken, where the witnesses giving said testimony are dead or now residing beyond the limits of said territory; and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong; and the rolls so prepared by them shall be hereafter held to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: Provided, that if the tribes or any person be aggrieved with the decision of the tribal authorities or of the Commission provided for in this Act, it or he may appeal from such decision to the United States District Court, provided, however, that the appeal shall be taken within sixty days, and the judgment of the Court shall be final.

That the said Commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose rights may be conferred under this Act,and said rolls shall be and are hereby made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States Courts, as provided herein.

The Commission is hereby required to file the lists of members as they finally approve them, with the Commissioner of Indian Affairs, to remain there for use as the final judgment of the duly constituted authorities. And said Commission shall also make a roll of freedmen entitled to citizenship in said tribes, and shall include their names in the list of members

to be filed with the Commissioner of Indian Affairs; and said Commission is further authorized to make a full report to Congress of leases, tribal and individual, with the area, amount and value of the property leased, and the amount received therefor, and by whom and from whom said property is leased, and is further directed to make a full and detailed report as to the excessive holdings of the members of said tribes and others.

It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said territory, and afford needful protection to the lives and property of all citizens and residents thereof.

We have set out the Act of June 10, 1896, fully, because we will have many occasions to revert to it in the consideration of these questions. Before we determine whether notice was indispensable to both nations under that Act, we deem it proper to determine what rights were conferred by these judgments; and, if any rights at all, were they such property rights as required notice to both nations? Whether these judgments simply conferred a bare contingent right, that did not mean anything, or whether they did or did not carry with them the right to participate in the tribal property ultimately. (Now, it is conceded by all parties that these persons who obtained their citizenship by virtue of these judgments, under the Act of June 10, 1896, acquired all the rights, and were entitled to all the benefits, of those Indian citizens whose citizenship was not in question.)

To determine this question we will see how these lands are held by the Choctaw and Chickasaw tribes, and in doing this we deem it proper to trace their title.

By virtue of stipulations contained in the treaty

of 1830, between the United States and the Choctaw Nation or Tribe of Indians, and, in lieu of certain property owned by the Choctaw Nation east of the Mississippi river, the United States, through the then President, John Tyler, after reciting some of the causes that led up to the treaty of 1830, made the following grant to the Choctaw Nation:

GRANT.

"To all to whom these presents shall come Greeting:

"Whereas, by the second article of the treaty, began and held at Dancing Rabbit Creek, on the fifteenth day of September, in the year of our Lord one thousand eight hundred and thirty (as ratified by the Senate of the United States, on the 24th of February, 1831), by the Commissioners on the part of the United States, and the Mingoes, chiefs, captains and warriors of the Choctaw Nation, on the part of said nation, it is provided that 'The United States, under a grant specially to be made by the President of the United States, shall cause to be conveyed to the Choctaw Nation,' a tract of country west of the Mississippi river, in fee simple, to them and their descendants, to inure to them while they shall exist as a nation, and to live on it: Beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red river, and down Red river to the Western boundary of the territory of Arkansas; thence north along that line to the beginning. The boundary of the same to agreeable to the treaty made and concluded at Washington City in the year 1825.

"Now Know Ye, That the United States of America, in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have given and granted, and by these presents do give and grant unto the said Choctaw Nations, the aforesaid 'Tract of country west of the Mississippi river;' to have and hold the same, with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, as intended 'to be conveyed' by the aforesaid article, 'in fee simple to them and their descendants, to inure to them, while they shall exist as a nation and live on it' liable to no transfer or alienation, except to the United States, or with their consent.

In testimony whereof, I, John Tyler, President of the United States of America, have caused these letters to be made patent, and seal of the General Land Office to be hereunto affixed. Given under my hand at the City of Washington, the twenty-third day of March, in the year of our Lord one thousand eight hundred and forty-two and of the Independence of theUnited States, the Sixty-sixth.

"By the President,
JOHN TYLER.
DAN'L WEBSTER,
Secretary of State.
JOHN C. SPENCER,
Secretary of War.
T. HARTLEY CRAWFORD,
Commissioner of Indian Affairs.

"Recorded. Volume 1, Page 43.
J. WILLIAMSON,
Recorder of the General Land Office.

"Executed in the Bureau of Topographical Engineers.
JOHN J. ALBERT,
Col. Corps T. Engineers."

Then, in 1837, a treaty was made by the Choctaw and Chickasaw Nations, and in Article I of the treaty, we find this language:

"It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country" (especially meaning the country that had been granted to the Choctaws by virtue of the treaty of 1830) "to be held on the same terms that the Chocktaws now hold, except the right of disposing of it which is held in common with the Choctaws and Chickasaws, to be called the Chickasaw district of the Choctaw Nation."

In Article III, of the same treaty, we find this language:

The Chickasaws agree to pay to the Choctaws, as a consideration of these rights and privileges the sum of five hundred and thirty thousand dollars," etc.

Then we find in 1855 a treaty entered into by and between the United States and the Choctaw and Chickasaw tribes of Indians. (This seems to be the first treaty made where the United States and the Choctaw and Chickasaw Nations were all parties.) It seems by the preamble of that treaty that strife and dissension had sprung up between the two nations.

In Article I, of the treaty of 1855, is found the following:

"The following shall constitute and remain the boundaries of the Choctaw and Chickasaw county."

And then we find this language in the same article:

"And pursuant to an Act of Congress, approved May 28, 1830, the United States do hereby for-

ever secure and guarantee the lands embraced in the said limits to the members of the Choctaw and Chickasaw tribes, and heirs and successors, to be held in common, so that each and every member of either tribes shall have an equal and undivided interest in the whole."

And we find this provision therein:

"*Provided, however*, no part thereof shall ever be sold without the consent of both tribes, and that said lands shall revert to the United States if said Indians and their heirs become extinct, or abandon the same."

Then article two, of this same instrument, sets apart a district for the Chickasaws, giving the boundaries thereof; and article three provides that the remainder of the country held in common by the Choctaws and Chickasaws shall constitute the Choctaw district.

Article five provides that the members of either the Choctaw or Chickasaw tribes shall have the right freely to settle within the jurisdiction of the other, and shall thereupon be entitled to all the rights, privileges and immunities of citizens thereof. Article eight provides that, in consideration of the foregoing stipulations, and immediately upon the ratification of this convention, there shall be paid to the Choctaws, in such manner as their national council shall direct, out of the national fund of the Chickasaws, held in trust by the United States, the sum of one hundred and fifty thousand dollars. And, in consideration of the relinquishment of claims to lands held by these two nations west of the Mississippi river, the United States, in article ten of said treaty, agrees to pay the Choctaws the sum of six hundred thousand dollars and the Chickasaws the sum of two hundred thousand

dollars; and by article fourteen of this treaty of 1855, the United States further agreees to protect the Choctaws and Chickasaws from domestic strife, from hostile invasion, and from aggression by other Indians and white persons, in opposition to their jurisdiction and laws.

In 1866 another treaty was entered into by the Choctaws and Chickasaws and the United States, by which the Choctaws and Chickasaws, jointly, ceded to the United States Government a part of the territory that had been conveyed to them by grant, in consideration of three hundred thousand dollars, paid by the United States to the two nations. Article six, of the treaty of 1866, providing a means by which a right of way through these lands should be acquired, expressly stipulates that the price to be paid for the lands taken for such right of way, should be agreed upon between the Choctaw and Chickasaw nations and the company and companies seeking such right of way, and to be approved by the President of the United States.

In article eleven, of the treaty of 1866, this provision is found:

"Whereas, the lands occupied by the Choctaw and Chickasaw nations, and described in the treaty between the United States and the said nations, of June 22, 1855, is held by the members of said nations in common under the provisions of said treaty; and whereas, it is believed that the holding of said land in severalty," etc.

In article fifteen of the same treaty, after providing for the selection of seats of justice, and lands for the endowment of schools, colleges, etc., this language is found:

"* * * At the expiration of a time therein named, the selection which is to change the tenure of land in

the Choctaw and Chickasaw nations from a holding in common to a holding in severalty. * *"

In article seventeen, of the treaty of 1866, after providing that the missionaries who had come to this country should not be deprived or interfered with in the continued occupation of their several missionary establishments; and providing, further, that should any missionary, who had been engaged in missionary labor for five consecutive years prior to this treaty in the nations, or either of them, or three consecutive years prior to the civil war, and who having absented himself from said nation, may desire to return, it is provided that such missionary be allowed to select a quarter section of land for a permanent home for himself and family. And in the same article granting lands to religious societies and denominations, it is provided that no land therein granted shall ever be sold or otherwise disposed of without the consent of both nations, and the approval of the Secretary of the Interior.

So it will be seen that in the treaty between the two nations in 1837, it is expressly provided that lands shall he held in common by the two nations. By the treaty of 1855, between the two nations and the Government, in is expressly provided that such lands shall be held in common, with this further explanatory provision, "so that each and every member of either tribes shall have an equal, undivided interest in the whole," with a further provision that no part thereof should be sold without the consent of both tribes. And in the treaty of 1866 the same conditions and limitations are incorporated, as were the former treaties referred to.

It is a significant fact that in all these treaties, wher-

ever land is mentioned, it is expressly provided that it is held in common by these two tribes. It is a further significant fact that wherever any provision is made for any disposition of the lands, it is provided that the price to be paid for same should be agreed upon between the two nations; and the disposition of any of the lands, before taking place, is to be agreed upon by the two nations. Even in the lands donated to the missionaries, who came here and administered to the spiritual needs of the Indian, and endured hardships, perils and dangers incident to such residence at that time, the Indian while recognizing that wholesome gratitude that must be commended, was so cautious as to the distribution of his property, ingrafted into that treaty that the lands therein granted should not be disposed of except by and with the consent of both nations. When the United States purchased a part of their territory under the treaty of 1866, it purchased the same not from the Choctaws alone, nor from the Chickasaws alone, but from the Choctaws and Chickasaws, and paid the two tribes therefor three hundred thousand dollars.

We have set out the provisions of these different treaties because we consider it important. And, after a careful consideration of the provisions of these treaties, and the legislation above referred to, is there any questioning the fact that this land is held in common by these two tribes? And that each and every member of these two tribes of Indians owns an equal undivided interest in the lands conveyed under the treaty of 1855, and which is now conceded to be all the lands embraced in the territory known as the Choctaw and Chickasaw Nations, in the Indian Territory, except that part heretofore disposed of by them?

And the further fact that no part thereof has ever been disposed of without their joint consent? These treaties mean that or they do not mean anything.

That question being settled our next inquiry is, what rights, if any, did these judgments confer? It is contended by the defendants in this case that they did not confer such rights of property as would require those who were to be affected by the judgments to have notice of the proceedings. We have shown by the legislation of Congress, heretofore set out, the great purpose of Congress in sending this Commission to the Indian Territory, known as the Dawes Commission, was to negotiate with the Indians looking to an allotment of the lands to the individual Indian in severalty, so that a State might be ultimately created, and to secure to each and every Indian in these two nations a sufficient quantity of land to meet his needs. This legislation further shows that this Commission could not form any agreement with the Indians that would accomplish that purpose. The Commission reported these facts to Congress, and the Act of 1896 was passed, we may assume, in consequence of these reports.

The Commission, under this Act, was authorized and directed to proceed at once to hear and determine the application of all persons who might apply to it for citizenship in any of the said nations, and, after such hearing, they shall so determine the rights of said applicants to be admitted and enrolled. It was necessary before the allotment took place that the applicant should be admitted as a citizen of either one of these tribes: if he was a Choctaw, he must be admitted as a Choctaw citizen: if a Chickasaw, he must be admitted as a Chickasaw citizen. And then, after he

was admitted, the Act directed that the Commission should put him on the roll. We might ask the question, what was the purpose of this? Why should he be admitted as a citizen and placed on the rolls? Did the Congress of the United States pass this Act simply to allow a man to be admitted as an Indian citizen when it conferred no rights? was it simply to subject the applicant to tribal laws, etc.? or, did it pass this act for the purpose of seeing who the real Indian was, and placing him on the rolls, so the allotment might take place and the lands be divided in severalty, as it had expressed in the legislation above referred to, was its great desire?

When the applicant was admitted he was placed on the rolls, and then he became entitled to all benefits enjoyed by the Indian whose rights were not in question. Then, did he not become entitled to his individual interest in the common estate, as soon as the same was allotted? We are forced to answer this question in the affirmative.

It is admitted by the defendants that these various parties, who were admitted to citizenship under these judgments, are now in possession of large tracts of land that belong to these two nations. They have enjoyed the benefits, the rents, and profits of these lands since the rendition of these judgments; and they went into possession of the same by virtue of the judgments so obtained under the Act of June 10, 1896. Then we might ask, how can it be contended that these judgments did not confer property rights?

Upon the question as to the rights conferred by the admission of a person as a citizen of these two tribes, the learned Judge of the Central District of the Indian Territory, who tried these cases in said District under

the Act of June 10, 1896, in his opinion in the case of F. R. Robinson vs. Choctaw Nation, when he came to discuss the rights of a white man, who had been admitted to citizenship by virtue of marriage with an Indian woman, uses this language: "The marriage had vested a title to the lands in him."

Also the learned Judge of the Southern District of the Indian Territory, who tried these citizenship cases, under the Act of June 10, 1896, supra, when he came to discuss what rights were conferred upon a United States citizen by his marriage to a Choctaw or Chickasaw woman, and thereby acquiring citizenship in the tribe, uses this language: "Besides it (meaning marriage) is supposed to carry with it certain property rights."

Chief Justice Fuller says in the Stephens case, above referred to, "these are not absolute vested rights," but we are bound to conclude that they were such rights as gave the applicant, when he was admitted and enrolled, rights in common property. Then, if that be true, was he seeking such right when he made application as would require, under the law, notice to the adverse party, or those who held the property in common, that their property was about to be diminished? that an estate was about to be carved out of the whole? In fact, was not enrollment, as here involved, but a step, and a vital one, looking to the partition or condemnation, so to speak, of a part of the common property of the two nations, the Choctaws and the Chickasaws?

We understand the general rule in equity cases, with reference to parties, to be in accordance with the fundamental principles of justice, that all persons interested in the object of a suit, and whose rights will be directly

affected by the decree, must be made parties to the suit. (Exceptions to this rule have been admitted none of which apply in this case); but in every case there must be such parties before the court as to insure a fair trial of the issues in behalf of all.

McArthur vs. Scott, 113 U. S., page 1031.

All who are interested in the decree shall be made parties to the proceedings, but the rule is not without exceptions, and it does not apply where parties cannot be found, and where great inconvenience would result from its application. Where a person is interested or involved in a suit he should be made a party.

Danbridge vs. Washington, Ex., 2 Peters, p. 454.

In other words, we understand the rule to be, all those whose presence is necessary to a correct determination of the entire controversy *must* be made parties.

Justice Livingston, in delivering the opinion of the court in the case of Marshall vs. Beaverly, 5 Wheat., 313, uses this language:

"It is not the course of courts of equity to make a decree which is operative directly upon the parties in interest without affording them an opportunity of being heard."

We could quote a great many decisions bearing out this principle, but it is a principle so well settled that we need not spend any time thereon.

Here is a large body of land belonging to these two tribes. Congress in its various acts, supra, said that it desired to allot this land in severalty. Was the Choctaw nation interested in who was made a Chickasaw citizen? Or was the Chickasaw nation interested

in who was made a Choctaw citizen? Most assuredly it sems to us they were. The natural effects of these judgments was to deprive them of a part of their lands, then, under the well established principles of law, was it not necessary, when the applicant came and presented his application, and an allowance of same, and putting him on the rolls, had the effect of his sharing in the distribution of these lands, then, naturally, why was he not interested in these proceedings so vital to his rights?

The counsel for the defendants contend that the proceedings in this case were on a parallel with the proceedings for naturalization. We can see no kinship between the two. The defendants contend that the decree of the court declaring a person a citizen under the naturalization laws entitle him to preempt land and acquire a homestead in the public domain. That may be true. The Government is then dealing with its own property, and the rights of no third parties intervene, but here the Government is dealing with its wards, and with people who own this property. The Government of the United States has not only given them a grant to it, but by solemn treaty has said: "This is your property; hold it in common. It is yours as long as you and your heirs exist, unless you abandon the same." The Government has not only said this to the Indian, but further, that it will protect him from other Indians and white people who attempt to invade his rights.

The defendants argued with considerable earnestness, that, under the Act of June 10, 1896, if notice was necesasry to either nation, notice to one was sufficient, and that service on both nations was not

necessary, because citizenship had been conferred by each of these nations without the concurrence or intervention of the other; and that the Act of June 10, 1896, directed the Dawes Commission, that in determining all such applications the Commission should respect the laws of the several nations or tribes. That contention is met by the conceded fact that these nations had become so corrupt, and many people who were entitled to citizenship had been deprived of their rights, and that citizenship had been conferred upon those who were not entitled to it. The Congress of the United States, we have a right to assume, with a knowledge of these facts, and doubtless remembering the provisions of the treaty of 1855, stipulating that the United States Government shall protect these Indians in their rights from invasion of intruders, took from these tribes the right to confer citizenship and placed it in the hands of the agents of the Government, at the same time admonishing these agents to respect, in determining these citizenship questions, all laws of the several nations or tribes. Had Congress stopped there, there might have been some force in this contention, but it went further, and provided that, not withstanding the Commission should respect the laws of the several nations or tribes, added, "not inconsistent with the laws of the United States and all treaties with either of said nations or tribes."

In other words, it directed the Commission to respect the laws of the several nations or tribes, providing the same were not inconsistent with the laws of the United States.

Now, was conferring citizenship by one nation, and thereby diminishing the property of the members of the other nation—that being the ultimate result—

without any notice to that nation affected by the bestowal of such citizenship, inconsistent with the laws of the United States? Was that not depriving the members of that nation, who had a common interest in the lands of both nations, of their property rights without due process of law? We are forced to the conclusion that it was.

Congress did not stop here, but it went further and provided and directed, in the Act of June 10, 1896, the Dawes Commission in the performance of such duties, shall have power and authority to administer oaths, to issue process and compel the attendance of witnesses, and to send for persons and papers and all depositions and affidavits, in any form whatsoever heretofore taken, where the witnesses giving such testimony are dead, or now reside beyond the limits of said Territory, and further directed the Commission to use every fair and reasonable means within its reach for the purpose of determining the rights of persons claiming such citizenship, and to protect any of said nations from fraud or wrong. Congress, being so jealous of the rights of these "once powerful but now dependent people," enjoined upon this Commission to use every fair and reasonable means in determining the rights of citizenship or to protect the Indian from fraud or wrong. Was it not reasonable to serve notice on both of these nations, so they could have come into court and contested the rights of those who were seeking to gain an interest in their common property?

As we have said before, the general rule is that all those whose rights are affected by the decree should be made parties to the action; that being true, we are forced to the conclusion that Congress did not intend

to prescribe a different rule to be followed when dealing with a helpless and dependent people.

The defendants, in their learned and exhaustive argument, laid down this proposition, and seemed to place considerable stress thereon, that the Act of June, 1896, in not providing for notice, was equivalent to a declaration by Congress that no notice was necessary in order to carry out its purpose in making a roll of citizenship in the tribes. We do not think that can be the law, but think, in the absence of a declaration in the statute upon this point, that Congress assumed, when it passed the Act of —June 10, 1986, and was silent upon this point, that the Commission, as well as the courts, would follow the well-established rules and principles of law in these citizenship proceedings that had been conferred upon the Commission and courts to determine. Congress directed the Commission to use every fair and reasonable means within its reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong. Mark the language. How could they be protected when they were not given the opportunity of being heard when a part of their property was about to be taken?

The defendants insist that the Supreme Court in the Stephens case, above cited, held that Congress had the power to authorize the Commission to make the rolls in the manner provided for in the Act, and that this is equivalent to a declaration by the Supreme Court in that case, that in making the rolls notice to the tribes was not indispensable. In insisting upon this contention, they, however, admit that the question as to whether notice had been given to both tribes, or either tribe, or as to whether such notice was necessary,

was not presented to the Supreme Court. We assume therefore, that the Supreme Court did not pass upon that question, and especially so when the learned Chief Justice, in delivering the opinion in the Stephens case, expressly says in that opinion that the Court had confined itself to the question as to the constitutionality or the validity of the legislation. If the question of notice had been presented to the Supreme Court, and that Court had passed upon that question, of course, this Court would be bound by its decision.

It is admitted that the question as to whether notice was indispensable to both tribes in the proceedings under the Act of June 10, 1896, supra, was never raised, either before the Dawes Commission or upon appeal to the United States District Courts for the Indian Territory, and, in fact, was never raised in any legal proceeding except in this case.

We deem it just to the Dawes Commission, and also to the United States Courts, who tried these cases, to say this much.

In the answer of Julia London, et als., filed in this cause, it is alleged that this court has no jurisdiction or power to entertain the bill for the purpose of setting aside, cancelling and annulling the judgments of the United States Courts for the Indian Territory, which are set forth in the bill in this case; and they deny that Congress had the right to pass the Act of July 1, 1902. Hence they contend that the Act of July 1, 1902, is in violation of the Constitution of the United States. These defendants, who set up this question in their answers as well as many of the other defendants in this proceeding, filed a demurrer to the bill in this case, attacking the validity and constitutionality of

this legislation, upon the same grounds as are set up in this answer.

After a full and exhaustive discussion of this matter, covering a period of five days, this Court overruled the demurrer so filed, and all of them. Therefore, without going into a full discussion of this matter again, we now hold that Congress did have the right to pass the Act of July 1, 1902, and every provision thereof; and that the same is not in conflict with the Constitution of the United States, or any of its provisions.

Having determined the first legal question involved in this proceeding, we now come to a consideration of the second proposition: Whether the proceedings in the United States Courts in the Indian Territory, under the Act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission, and should not have extended to a trial *de novo* of the question of citizenship.

The Act of June 10, 1896, with reference to appeals in these cases from the Commission, known as the Dawes Commission, contained this proviso: "Provided, that if the tribe or any person be aggrieved with the decision of the tribal authorities, or the Commission provided for in this case, it or he may appeal from such decision to the United States District Court; provided however, that the appeal shall be taken within sixty days, and the judgment of the court shall be final." It will be observed that there is nothing in the statute itself, declaring in terms that such appeal shall be tried *de novo*, and, in fact, there is no prescribed mode of procedure specially set out in the Acts as to the matter of Appeals. Then we are to determine what

Congress meant when it said by the Act of June 10, 1896, that the party aggrieved should have the right of appeal to the United States Court; that is, what is meant by the word "appeal," accompanied by the other language of the Act. In other words, what kind of an appeal was applicable to the case in hand, as to the procedure to be pursued in determining the case in the appellate tribunal?

The defendants contend that, inasmuch as there was no provision in the Act of June 10, 1896, requiring the cases *not* to be tried *de novo*, Congress, by the act of June 10, 1896, intended that the trials should have been *de novo*. In other words, that if Congress had intended that the United States Courts for the Indian Territory, in the trial of these appeals from the Dawes Commission, should have been confined to a review of the case, it would have said so in the Act itself; and they further contend that the only jurisdiction the United States Courts had, to try cases appealed to them, was to try them *de novo*. In support of their contention, defendants cite the practice of the United States Courts in the Indian Territory with reference to appeals from mayors of incorporated towns, and United States Commissioners therein, showing that in all such appeals the trials are had *de novo*.

To pass upon this contention we deem it necessary to refer to the Acts of Congress authorizing appeals from mayors and commissioners in the Indian Territory, for the purpose of ascertaining whether or not such Acts of Congress prescribed how such appeals shall be tried when they reach the United States Court and in doing so we shall set out as much of these statutes as we think bear upon this point.

An Act entitled "An Act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Courts in the Indian Territory, and for other purposes" was passed by Congress, May 2, 1890, and is found in the United States Statutes-at-Large, Vol. 26, Chap. 182, page 81, in which, after providing for the appointment of commissioners and designating what the qualifications of these commissioners shall be, etc., we find this provision:

"The provisions of Chapter 91, of the Laws of Arkansas, regulating the jurisdiction and procedure before the Justices of the Peace are hereby extended over the Indian Territory * * *."

And then, in providing how appeals shall be taken from these commissioners: It is further provided that appeals may be taken from the final judgments of said commissioners to the United States Courts in the Indian Territory, in all cases, and in the same manner, that appeals may be taken from the final judgments of Justices of the Peace, under the provisions of said Chapter 91.

The Chapter 91 which is referred to, is found in Mansfield's Digest of the Laws of Arkansas; and in order to determine what procedure is prescribed in appeals from Justices of the Peace under the Arkansas Statutes, as set out in Chapter 91 of Mansfield's Digest, we have examined that provision of the Arkansas law under the head of "Appeals" in that chapter. After providing that any person aggrieved by any judgment rendered by any Justice of the Peace, etc., and after providing how the appeals shall be taken, we find this provision:

"Upon the record of the Justice being filed in the Clerks' office, the Court shall be in possession of the case and shall proceed to hear, try and determine the same anew, upon its merits, without any regard to any error, defect or imperfection in the proceedings of the Justice."

With reference to appeals from Mayors, we find the same provision as to appeals from Justices; and it will be seen that in the case of appeals from Commissioners of United States Courts in the Indian Territory, the statute itself prescribes that the trials shall be *de novo*, and not confined to a review.

The defendants in their oral arguments, as well as in their printed briefs, cite the case of the United States vs. Ritchie, 58 U. S., page 524, and seem to rely upon that decision largely in support of their contention, that Congress, by the Act of June 10, 1896, intended that these appeals should be tried *de novo*, and the Court should not be confined simply to a review of the action of the Dawes Commission. In fact, the Judge for the Central District of the Indian Territory seems to have based his authority to try these appeals from the Dawes Commission, under the Act of June 10, 1896, upon the decision of the United States Supreme Court in the Ritchie case, supra. We think we are warranted in saying this from the language found in his opinion, as appears, beginning on page 110, in the report of the Commission to the Five Civilized Tribes for the fiscal year ending June 30, 1901, which is as follows:

"There are upon the dockets of this Court, appealed from the Commission to negotiate with the Five Civilized Tribes, known as the Dawes Commission, two hundred and forty-one cases, involving the rights of citizenship in the Choctaw Nation of about two thousand

five hundred applicants. All of these cases have been by my predecessor, Judge Lewis, placed on the equity side of the Docket, and in the case of Mary A. Sanders, No. 63, a motion to transfer to the law side of the docket was filed and argued, and by him overruled. It is not my purpose in these cases to disturb or go back and open up questions already decided, but to adopt the past rulings of the Court, and to proceed as rapidly as possible to a final disposition of them. In passing I will remark, however, that it seems to me that the peculiarity of these cases, the many suits brought by persons having a common interest and a common purpose against the same defendants, the difficulties of enforcing the rights by judgment of law, and the many equities claimed by both parties to these suits, make them proper cases for a court of equity.

"The question of the jurisdiction of this Court to hear and determine these cases has been raised by the pleadings. The counsel on neither side, however, has seen fit to press this question or to point out, either by brief or oral argument, the reasons for this contention. The statute giving the Court jurisdiction is plain, and I know of no constitutional objections. It has been said, however, that Congress does not possess the power under the Constitution to give to the courts of the United States appellate jurisdiction over the final orders and awards of commissions and other such tribunals. This very question was raised in the case of the United States vs. Ritchie, decided by the Supreme Court of the United States, and reported in Vol. 58, United States Supreme Court Reports, page 524. In that case the proceedings were originally commenced before a board of commissioners to settle private land claims in California, under Act of Congress of March 3, 1851. Provisions were made by the Act, at the suit of the losing party, for an appeal to the United States District Court for the Northern District of California. The board decided the case in favor of the claimant and against the government. The United States appealed in accordance with the provisions of the statute, afore-

said District Court, where it was again tried *de novo*, and an appeal regularly taken to the United States Supreme Court. In that Court the question of the jurisdiction of the District Court to try the case was raised. The contention is stated in the opinion."

Upon an examination of the Act of Congress referred to by Judge Clayton, under the provisions of which the decision of the Supreme Court was based, it will be found that the Act itself provided that upon an appeal from the commission to settle the private land claims in California to the United States Court, in section 10 thereof, that the United States District Court for California should proceed and render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken upon the order of said court in such appeal. So it will be seen in this case, as well as in the cases upon appeal from the United States Commissioners in the Indian Territory, that the Acts themselves provided for a trial *de novo*. It will further be seen, by referring to the Act of June 10, 1896, supra, under which the United States courts were proceeding, contained no such provision or direction; it simply provided, that if the tribe or any member be aggrieved by the decision of the tribal authorities, or the Commission provided for in this case, it or he might appeal from such decision to the United States District Court: *Provided, however*, that the appeal shall be taken within sixty days, and the judgment of the court shall be final. But it is claimed that the Supreme Court of the United States, speaking through Chief Justice Fuller, in the case of Stephens vs. Cherokee Nation, 174 U. S., page 445, has decided unmistakably that such trial was to be

had *de novo*. If this contention was sound, of course, this Court would be bound thereby. But let us look at the language used by the learned Chief Justice in delivering the opinion in the Stephens case. His language is as follows:

"As to the first of these objections, conceding the constitutionality of the legislation otherwise we need spend no time upon it, as it is firmly established that Congress may provide for the review of the action of commissions and boards created by it exercising only *quasi* judicial powers, by the transfer of their proceedings and decisions, denominated 'appeals' for want of a better term, to judicial tribunals for examination and determination *de novo*."

Now, we may ask, what was the first objection to which the Chief Justice referred in stating his views above quoted? It was stated by him thus:

"The question arises, whether the judgments made final by the statutes are the judgments of that Court in the several districts delineated by the Act of March 18, 1895, or of the appellate court herein provided for, which may be referred to later on, since it is objected to in the outset that no appeal from the decisions of the Dawes Commission, or of the tribal authorities, could be granted to the United States Court; and furthermore, that at all events it will not be competent for Congress to provide for an appeal from the decrees of the United States Courts in the Indian Territory, after such decrees have been rendered and the term of court expired."

Now, it will be seen here, the learned Chief Justice does not determine that the right and power of appeal, which is treated of above, does as a matter of fact, conclusively carry with it, in the very terms of the

Act conferring the right and power; the right to prosecute an appeal *de novo;* or, that it orders or declares by any act or any language, that can bear such a construction, that the procedure on appeal is to be a trial *de novo*; or that it specifies what the procedure in the appellate court shall be. In addition, the Chief Justice in his decision in the Stephens case, distinctly declares that the United States Supreme Court had only power in determining that case, to hear such appeal as he was passing upon, under the Statute of 1896, in so far, merely and entirely, as the constitutionality of the act or acts was concerned; but the question of the right of appeal *de novo*, as was claimed existed to the District Courts of the Indian Territory, under the Act of June 10, 1896, did not and does not involve any constitutional questions. The learned Chief Justice says that Congress may pass an act constitutionally, commanding a trial *de novo*, in the court above and goes no further.

It will be observed that the Chief Justice did not say that the Act of 1896 meant that the appeal should be *de novo*, but says that Congress had the right to pass such an act.

The case of Kimberlin *vs.* Commission to the Five Civilized Tribes, decided in the Circuit Court of Appeals for the 8th Circuit, and which is found in the C. C. A. Vol. 44, Page 109, where some two years after the expiration of the time fixed by the Act of June 10, 1896, within which the Commission is authorized to receive applications for citizenship, Mary Jane Kimberlin filed her application and asked that it be passed upon. The Commission held that it had no power to receive or pass upon applications after September 10, 1896. The applicant applied to the United States

Court for the Southern District of the Indian Territory, for a writ of mandamus to compel the Commission to entertain her application and admit her. The court denied the petition, and an appeal was taken to the Court of Appeals for the Indian Territory. Its decision was an affirmance of the decision of the District Court, and an appeal was taken to the United States Circuit Court of Appeals for the 8th Circuit. Judge Sanborn, in delivering the opinion, among other things, says, in speaking of the right of appeal, as given in the Act of June 10, 1896.

"It provides for the speedy determination of the questions presented by the various applications, and gives each applicant the right to a *review* of the action of the commission by an appeal to the Federal Court."

That is a looking over, of any appeal to the United States District Courts of the Indian Territory, in order to determine if any error was committed by said Commission as to law or fact, which requires correction. Judge Sanborn further says in this opinion:

"It is conceded that the Commissioners are executive officers; it is not their sole duty or chief function to hear and determine the controversies between contending parties. Nevertheless, in the determination of the citizenship of the parties, who may apply to them for membership in the Five Nations, they are vested with judicial power by the Act of Congress; they have authority * * * * to use every fair and reasonable means within their reach for the purpose of determining such citizenship, and above all they are empowered to determine the application of all persons who may apply to them for citizenship. This grant of power is plenary; it vests the authority and imposes the duty on the Commission to hear and decide every question of law and fact, which is material

to the rights of the applicant for enrollment as a citizen of the nation."

It may further be said, as bearing on the plenary powers of the above mentioned Commission, that the Act of June 10, 1896, further provides, following the portion above construed in the Circuit Court of Appeals, defining the powers of said Commission to hear and determine the question of citizenship, or to protect any of said nations from fraud or wrong. That is, everything in the power of said Commission was mandatorily directed by Congress to be done, and every reasonable step it could take, in order, as far as lay in its reach, to protect any of said nations from not only fraud, but from any wrong.

It thus appears that in this decision of the Court of Appeals, it is stated upon fair construction, that the Commission had judicial powers of a plenary nature. As to procedure, where does the language giving the right of appeal from the decisions even intimate that a review of the same question of law or fact are to be heard *de novo*, either as a matter of procedure or of right, or recommended, even remotely, as we can see? So, then, here we have a commission having plenary rights and powers given by positive law and clear language, to hear and determine all questions of law and fact which might come before it under the terms of the law conferring such jurisdiction, and the right of appeal, as expressed in the Act of June 10, 1896, from its decisions, avoiding everything going to declare that the appeal should be heard *de novo*, as did the statute involved in the Ritchie case, and also the statute governing the appeals from Commissioners of the United States Court, cited by the defendants,

giving a right of appeal to a trial *de novo*, or any language specifying the procedure to be had on such appeal in the court above. It follows, then, that we must determine how such an appeal should have tried in the United States District Courts of the Indian Territory, by interpreting fairly the language of the Act of June 10, 1896, giving appeal to the reviewing court of the last resort. From the language of the Act conferring plenary powers as a judicial body upon the Dawes Commission, supra, and also giving a right of appeal from its decisions, as the clause of the act giving the appeal does not distinguish it in any way perceptible to us from the ordinary court having plenary powers to try all cases as to law and fact, of which the Act of Congress gives it jurisdiction, it appears clearly that an appeal is to be granted in an ordinary way and manner, as if the appeal had been taken from an ordinary State Circuit Court to a Court of Appeals or from any similar court having plenary powers to try questions of law or fact, to an appropriate appellate court, for review of the action of the court below, having such plenary powers over matters to be heard under its jurisdiction originally.

The members of the Dawes Commission were appointed by the President and confirmed by the United States Senate, and having larger powers than those conferred on the Commissioners of the United States Courts anywhere, and, therefore, no parallel can be drawn with the powers of the United States District Courts of the Indian Territory, on appeal from such tribunals, the mere creation by appointment of the District Judge, with that possessed by the District Court on appeal from the Dawes Commission. The United States District Court Commissioner is the

creation of a direct legislative act of Congress, but having limited powers compared with those conferred upon the Dawes Commission by the Act of Congress giving it such vast powers, and especially under the Act we are now considering, to try these citizenship cases; and dignifying the members thereof not only with a grant of great power, but paying them salaries as great as the Judges of the District Courts, and their appointment by the President requiring the Senate's concurrence.

In considering the questions raised by the pleadings, we have considered all that part of the constitutions of the Choctaw and Chickasaw Nations, or tribes of Indians, and all their laws passed by their legislature and general council from time to time; and also all treaties made and entered into by said tribes with the United States, as well as those treaties entered into between the two tribes; and also the rules of the Commission to the Five Civilized Tribes, in existence in 1896, bearing upon the points at issue, which will be seen by reference to the opinion in this case.

So that in all the various aspects in which this question is to be viewed, considering the case of Kimberlin against the commission to the Five Civilized Tribes, supra, and all the statutes and decisions we have been able to examine; in further considering what dignity and power is conferred on the Dawes Commission, as to judicial and other powers, and the method of their appointment and confirmation, we are led to the irresistible conclusion that the appeals from the Dawes Commission, under the Act of June 10, 1896, to the United States Court in the Indian Territory, should have been confined to a review of the action of the commission upon the papers and evidence submitted to

such commission and should not have extended to a trial *de novo* of the question of citizenship. We think every fair construction and intendment of the language of the Act, giving the right of appeal to the United States Courts for the Indian Territory leads to this conclusion; and that grave and serious prejudicial error must necessarily be presumed, because the United States Courts for the Indian Territory in trying such appeals, proceeded without warrant of law, and therefore the judgments they rendered in the cases at bar, as in all cases where the parties are similarly situated, can not be upheld and should be annulled and declared void.

And as a further confirmation that such ought to be the judgment of this court in this proceeding, the fact that if notice to both tribes was indispensable, and in the sense meant in the Act of July 1, 1902, it will be remembered that this word "indispensable" has reference as well to the ordinary practice in such cases where a joint and common interest in property is held, as here by both tribes of Indians involved in this case, and also it has reference to what should have been done by the Dawes Commission in carrying out the declaration of Congress properly as to the method of acquiring jurisdiction, and the procedure to be pursued by the Dawes Commission, as set out in the Act of June 10, 1896, and this view is further confirmed when it appears that Congress in the 31st Section of the Act of July 1, 1902, has termed the failure to give both tribes notice, and the hearing *de novo* by the United States District Courts of the Indian Territory, not prescribed by the Act giving right of appeal from the Dawes Commission to the District Courts for the Indian Territory, as irregularities claimed and insisted upon

by such nations, thus clearly indicating that the Congressional view was and is, that the Dawes Commission having failed to give proper notice of a reasonable kind to both tribes, holding common interests in the lands of a proceeding affecting their joint property rights, and the United States District Courts having tried the cases on appeal *de novo*, the Act of June 10, 1896, not ordering it, that such matters not only be matters considered irregular, in order that a decree may be made through this court, speaking to the subject that such irregularities having occurred, the judgments involved here should be annulled and vacated.

In the determination of the questions raised by the pleadings in this proceeding, we have confined ourselves to the two legal propositions raised by the bill, in accordance with Section 31 of the Act of July 1, 1902, under which this proceeding was instituted, deeming it unnecessary to go into the other questions that are raised by the several answers, because we consider a determination of the two propositions as decisive of all. So, in consideration of all the various aspects of this case, and being of the opinion that owing to the manner in which the lands are held by the two tribes, that notice to both tribes was indispensable; and being further of the opinion that the proceedings in the United States Courts in the Indian Territory, under the said Act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commission, and should not have extended to trials *de novo* of the question of citizenship, we are of the opinion, on account of the errors pointed out, that the judgments rendered by the United States Courts for the Indian Territory, under the Act

of June 10, 1896, upon appeal from the Commission to the Five Civilized Tribes, in favor of the ten defendants named in the bill, as well as those who have come in and made themselves parties defendants, and all persons so situated, should be annulled and vacated, and it is, therefore, so ordered.

We concur fully, and entirely in what is written, said, and declared by Chief Judge Adams, in the opinion herein rendered and filed, both as to the reasoning, the conclusions arrived at, and the matters passed on and adjudged.

WALTER L. WEAVER,
Associate Judge.
HENRY S. FOOTE,
Associate Judge.

EXHIBIT B

'The Choctaw and Chickasaw Nations or Tribes of Indians,
Plaintiffs,
vs.
J. T. Riddle, D. S. Riddle, L. A. Riddle, Elizabeth Casey, Joshua Casey, Andrew B. Hill, L. T. Hill, James W. Balthrop, T. D. Arnold, J. H. Bratcher, for Themselves and as Representatives of all Persons Similarly Situated, Claiming to be Members of the Choctaw and Chickasaw Nations, by Virtue of Alleged Decrees of the United States Court for the Central and Southern Districts of the Indian Territory Sitting Respectively at South McAlester and Ardmore, and Commonly Known as Court Claimants Defendants.

This cause coming on further to be considered, and it appearing to the court, that the paper writing purporting to be the judgment of this court herein, heretofore filed with the clerk, does not conform to the written opinion announced and rendered by the court, which has been filed and entered as a part of the record herein it is therefore ordered, adjudged and decreed by the court, that said paper writing purporting to be the judgment of this court herein, of date the 17th day of December, 1902, be and the same is hereby amended, and the following is the true judgment, intended to be entered by this court herein of that date, and the same is hereby entered of record as the judgment of this court in this case, in accordance with the said opinion and that the same be so filed,

nunc pro tunc as of date, the 17 day of December, 1902, as follows, to wit:

This day this cause came on to be heard, and having been fully argued by counsel, was submitted to this court on the pleadings, exhibits and testimony, upon consideration whereof, the court finds:

That due and legal notice of the pendency and prayer of this suit has been given to the defendants herein, in conformity of law;

That said defendants appeared at the hearing hereof, in person and by counsel, and that each and all of said defendants, who desired to be heard, were heard;

That notice to each of said Choctaw and Chickasaw Nations or tribes of Indians of the proceedings in the United States Court in the Indian Territory, acting under the Act of Congress, approved June 10, 1896, admitting persons to citizenship, or to enrollment as such citizens, in the Choctaw and Chickasaw Nations respectively, was indispensable;

And the court further finds that in said proceedings, in the United States Court in the Indian Territory, and said courts proceeded to hear and determine said causes *de novo*, and did not confine the same to a review of the proceedings had before the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission;

That by reason of each of said facts, to wit: That the proceedings in said United States Courts, were had without notice to each of said tribes or nations when notice of each of said nations was indispensable, and that said United States Courts tried said causes *de novo* when their action should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence sub-

mitted to such Commission, all of said proceedings, decrees and decisions, of said United States Courts in the Indian Territory, admitting any and all persons to citizenship or enrollment, as such citizens in said nations or tribes of Indians or either of them, ought to be set aside, annulled and vacated.

It is therefore, Ordered, Adjudged and Decreed, that all of said judgments, decrees and decisions, rendered by the United States Courts in the Indian Territory, acting under the Act of Congress, approved June 10, 1896, admitting persons to citizenship or to enrollment as such citizens, in the Choctaw and Chickasaw Nations respectively, upon appeal from the Commission to the Five Civilized Tribes, in favor of the ten defendants, named in the bill in this proceeding, as well as to those who have come in and made themselves parties thereto, and the judgments rendered as aforesaid, in favor of all persons similarly situated, are set aside, annulled, vacated and held for naught.

(Signed) SPENCER B. ADAMS,
Chief Judge.
WALTER L. WEAVER,
Associate Judge.
HENRY S. FOOTE,
Associate Judge."

Supreme Court of the United States.

No. 260.—October Term, 1906.

Hugh Wallace, Will Wallace, Verge Goodwin, et al., Plaintiffs in Error, *vs.* Mrs. Ella Adams, for herself and as Natural Guardian and Next Friend of Henry McSwain and Roma McSwain, her minor children.	In error to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 25, 1907.]

Mr. Justice Brewer delivered the opinion of the Court.

This was an action commenced in September, 1904, by Mrs. Ella Adams, for herself and her minor children, defendants in error, in the United States Court for the Southern District of the Indian Territory, to recover possession of a tract of land in that Territory. Defendants answered, and upon trial judgment was rendered in favor of plaintiffs. This judgment was sustained by the United States Court of Appeals of the Indian Territory, and on further appeal reaffirmed by the United States Circuit Court of Appeals for the Eighth Circuit. 143 Fed. Rep. 716.

The case arises out of the legislation of Congress designed to secure the disintegration of the tribal organization of the Five Civilized Tribes in the Indian Territory, and the distribution of the property of those tribes among the individual Indians. A full resume of this legislation and the general litigation following it is to be found in *Stephens* v. *The Cherokee Nation*, 174 U. S. 445, and a full statement of the facts in this case is to be found in the opinion of the United States Circuit Court of Appeals. An entire restatement of these matters is, therefore, unnecessary.

There is but a single matter to be determined. As counsel for plaintiffs in error say:

"The assignment of errors presents but one question. If the decree of the Choctaw-Chickasaw Citizenship Court, in the test case known as the Riddle case, vacated the decree that defendant, Hill, had, theretofore, procured in the United States Court for the Southern District of the Indian Territory, wherein he was adjudged to be a member of the Choctaw tribe of Indians, this case should be affirmed. If it did not, it should be reversed."

To properly appreciate and rightly answer this single question some things in the history of the legislation and litigation and also some of the facts in this case must be noticed.

In order to divide the lands of these Indian nations an enumeration of the individuals entitled thereto became necessary. By the act of March 3, 1893, (27 Stat. 645, chap. 209, sec. 16,) the commission to the Five Civilized Tribes, generally known as the Dawes Commission, was empowered to negotiate and extinguish the tribal title to the lands and to make an allotment thereof to the members of the tribe in severalty. By that of June 10, 1896, (29 Stat. 339, 340, chap. 398) the commission was authorized to hear the application and determine the right of each applicant for citizenship in either of these tribes. The act also granted an appeal to the proper United States District Court in the Indian Territory to any party aggrieved by the ruling of the commission, and declared that the judgment of that court should be final. It required the commission to make a complete roll of the citizens of each of the tribes, to be "hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes." Hill, who is the principal defendant, applied to be enrolled as a citizen of the Choctaw Nation, and his application was finally sustained by the court, and he was, on March 8, 1898, adjudged to be a member of the Choctaw tribe by blood and entitled to be enrolled as such. The land in controversy was selected and taken possession of by him in reliance upon this adjudication of citizenship. On July 1, 1898, Congress passed an act (30 Stat. 591, chap. 545) granting to the tribes an appeal to the Supreme Court from the judgments of the United States courts of the Indian Territory in citizenship cases. Under the authority of this act many of these cases were appealed to this court, which affirmed the judgments. *Stephens* v. *Cherokee Nation*, *supra*. On March 21, 1902, an agreement was made between the United States and the Choctaw and Chickasaw Nations, which was confirmed by act of Congress July 1, 1902, (32 Stat. 641). This agreement and act were substantially that a court known as the Choctaw and Chickasaw Citizenship Court should be created, and that that court should have power in a suit in equity brought by either or both of these tribes against any ten persons who had been admitted to citizenship or enrollment by the terms of the judgments of the several United States courts in the Indian Territory, as representatives of all persons similarly situated, to determine whether the judgments of those courts should be annulled on account of certain alleged irregularities. The agreement and act also provided that in case the citizenship courts should decide that those judgments should be annulled, the papers in any action in those courts, wherein such a judgment had been rendered, should, upon seasonable

application of either party, be transferred to the citizenship court, which should proceed to a hearing and determination of the question of citizenship. Under this agreement and act the court was established and a test suit brought, in which a decree was entered to the effect that the judgments of the United States courts in the Indian Territory, whereby persons were admitted to citizenship in the Choctaw and Chickasaw Nations under the act of June 10, 1896, were annulled and vacated. Hill was not named a party in that test suit, nor did he thereafter apply for a transfer of his case to the citizenship court. The above statement of facts is sufficiently full for an understanding of the single question presented for determination.

That single question may be divided into two. First, was the decree in the Indian Territory court declaring Hill a citizen a finality, beyond the power of Congress to in any manner disturb? This was answered in the Stephens case (*supra*). In that case we held that Congress could authorize a review of the judgments of the United States courts of the Indian Territory in citizenship cases, and this although, by the terms of prior legislation, those judgments had become final. While sustaining the act authorizing such review and providing for appeals to this court we construed it as limiting the appeals to the question of the constitutionality or validity of the legislation, and not as bringing before us the facts in the instances of all applications for citizenship. In the opinion (page 477) we said:

"The contention is that the act of July 1, 1898, in extending the remedy by appeal to this court was invalid because retrospective, an invasion of the judicial domain and destructive of vested rights. By its terms the act was to operate retrospectively, and as to that it may be observed that while the general rule is that statutes should be so construed as to give them only prospective operation, yet where the language expresses a contrary intention in unequivocal terms the mere fact that the legislation is retroactive does not necessarily render it void.

"And while it is undoubtedly true that legislatures can not set aside the judgments of courts, compel them to grant new trials, order the discharge of offenders or direct what steps shall be taken in the progress of a judicial inquiry, the grant of a new remedy by way of review has been often sustained under particular circumstances. *Calder* v. *Bull*, 3 Dall. 386; *Sampeyreac* v. *United States*, 7 Pet. 222; *Freeborn* v. *Smith*, 2 Wall. 160; *Garrison* v. *New York*, 21 Wall. 196; *Freeland* v. *Williams*, 131 U. S. 405; *Essex Public Board* v. *Skinkle*, 140 U. S. 334.

"The United Sates court in Indian Territory is a legislative court and was authorized to exercise jurisdiction in these citizenship cases as a part of the machinery devised by Congress in the discharge of its duties in respect of these Indian tribes, and assuming that Congress possesses plenary power of legislation in regard to them, subject only to the Constitution of the United States it follows that the validity of remedial legislation of this sort can not be questioned unless in violation of some prohibition of that instrument.

"In its enactment Congress has not attempted to interfere in any way with the judicial department of the Government, nor can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments from review, and the mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, can not be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of a lower court beyond the power of re-examination by a higher court, though subsequently authorized by general law to exercise jurisdiction."

This decision established that no such vested right was created by the proceedings of the Dawes Commission or the judgments of the courts of the Indian Territory on appeal from the findings of the commission as prevented subsequent investigation. The power of Congress over the matter of citizenship in these Indian tribes was plenary, and it could adopt any reasonable means to ascertain who were entitled to its privileges. If the result of one measure was not satisfactory it could try another. The fact that the first provision was by an inquiry in a Territorial court did not exhaust the power of Congress or preclude further investigation. The functions of the Territorial courts in this respect were but little more than those of a commission. While the act of July 1, 1898, provided for an appeal to this court, and appeals were taken in many cases, yet our inquiry stopped with the question of the constitutionality of the legislation. In other words, we entertained and decided the purely judicial question of the validity of the means Congress had adopted for determining the matter of citizenship. We did not attempt to pass upon the question of citizenship in any particular case nor determine whether the applicant was or was not entitled to be enrolled as a citizen. It is unnecessary to consider what would have been the effect of a judgment of this court, a court provided for in the Constitution, on the question of the right of a litigant to citizenship. The distinction between this court and the courts established by act of Congress in virtue of its power to ordain and establish inferior courts is shown in *Gordon* v. *United States*, 117 U. S. 697, in which we held that while Congress could give to the Court of Claims jurisdiction to inquire and report upon claims against the Government, it could not authorize an appeal from such report to this court unless our decision was made a final judgment, not subject to Congressional review. In the opinion Mr. Chief Justice Taney said (pp. 699, 702):

"Congress may undoubtedly establish tribunals with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any claim for money against the United States, subject to the supervision and control of Congress, or a head of any of the executive departments. In this respect the authority of the Court of Claims is like to that of an auditor or comptroller, with this difference only, that in the

latter case the appropriation is made in advance, upon estimates furnished by the different executive departments, of their probable expenses during the ensuing year; and the validity of the claim is decided by the officer appointed by law for that purpose, and the money paid out of the appropriation afterwards made. In the case before us the validity of the claim is to be first decided, and the appropriation made afterwards. But in principle there is no difference between these two special jurisdictions created by acts of Congress for special purposes, and neither of them possess judicial power in the sense in which these words are used in the Constitution. The circumstance that one is called a court and its decisions called judgments can not alter its character nor enlarge its power. . . . Congress can not extend the appellate power of this court beyond the limits prescribed by the Constitution, and can neither confer nor impose on it the duty of hearing and determining an appeal from a commissioner or auditor, or any other tribunal exercising only special powers under an act of Congress; nor can Congress authorize or require this court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect."

This decree was followed by legislation which in a general way provided that the rulings of this court on appeals from the judgments of the Court of Claims should be in effect judgments. While that case is not entirely parallel to this, yet the line of thought pursued in the opinion is suggestive. We do not feel called upon to enlarge upon it. It is enough now to hold that Congress in giving to the Indian Territory courts jurisdiction of appeals from the action of the Dawes Commission did not place the decisions of these courts beyond the reach of further investigation. Hence the act of Congress of July 1, 1902, creating the Choctaw and Chickasaw Citizenship Court, and giving to it power to examine the judgments of the Indian Territory courts and determine whether they should not be annulled on account of irregularities was a valid exercise of power.

The other question is one of procedure and not of power. It is objected that the defendant Hill was not made a party to the proceeding instituted in the citizenship court, but there were a multitude, according to the report of the Dawes Commission, probably one thousand, in whose favor judgments of citizenship had been entered in the Indian Territory courts, and the act provided that ten should be selected as representatives of the class. It further authorized any individual, in case of an adverse judgment by the citizenship court, to transfer his case from the Territorial to that court. Now, it is undoubtedly within the power of a court of equity to name as defendants a few individuals who are in fact the representatives of a large class having a common interest or a common right—a class too large to be all conveniently brought into court—and make the decree effective not merely upon those individuals, but also upon the class represented by them. *Mandeville* v. *Riggs*, 2 Pet. 482; *Smith* v. *Swormstedt*, 16 How. 288; *Bacon*

v. *Robertson*, 18 How. 480, 489; *United States* v. *Old Settlers*, 148 U. S. 427, 480. It was by way of extra precaution and in order to more effectually secure the rights of the individuals other than those named as parties defendant in that suit that Congress provided that any one might transfer his individual case from the Territorial court to the citizenship court, and there have the merits of his claim decided. Hill, as every other citizen, was bound to take notice of the legislation of Congress, and it is not to be doubted that he as well as others similarly situated were cognizant of the proceedings that were being had in pursuance of such legislation. He made no application to transfer his case, but chose to abide by the outcome of the case against the ten representatives of his class. The answers to these subordinate questions fully dispose of the main question. Without further discussion, we refer to the exhaustive opinion of Circuit Judge Sanborn, in delivering the judgment of the Court of Appeals, with which, in the main, we fully concur.

We find no error in the record, and the judgment of the Court of Appeals is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.